ENTERED OCT 26 1960

F 2302

San Francisco

Law Library

436 CITY HALL

No. 167361

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs3072

No. 15991

United States
Court of Appeals
for the Ninth Circuit

HARSH CALIFORNIA CORPORATION, a Corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

FILED

JUN 16 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-13-58

No. 15991

United States
Court of Appeals
for the Ninth Circuit

HARSH CALIFORNIA CORPORATION, a Corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-13-58

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Attorneys, Names and Addresses of 1

Certificate by Clerk 78

Complaint

B—Statement of Unsecured Property Taxes 17

C—Letter Dated August 13, 1957 21

D—Letter Dated August 15, 1957 24

Documents Lodged With the Court October 14, 1957 32

Findings of Fact, Conclusions of Law and Order Denying Preliminary Injunction 71

Minute Order October 14, 1957—Hearing on Motion to Dismiss 32

Minute Order October 22, 1957—Denial of Application for Preliminary Injunction, etc. 70

Motion to Dismiss 30

Motion and Order to Extend Time for Filing Record on Appeal and Docketing Appeal, Filed December 27, 1957 74

INDEX PAGE

Motion and Order Extending Time for Filing Record and Docketing Appeal, Dated February 13, 1958 76

Notice of Appeal From Order Dismissing Action 73

Notice of Appeal From Order Denying Preliminary Injunction 74

Order Dismissing Action 72

Order to Show Cause 25

Statement of Points on Appeal 81

Temporary Restraining Order 29

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HOLBROOK, TARR & O'NEILL,
W. SUMNER HOLBROOK, JR.,

458 South Spring Street,
Los Angeles 13, California.

For Appellee:

ALBERT E. WELLER,
County Counsel;

J. B. LAWRENCE,
Deputy County Counsel,

316 Mountain View Avenue,
San Bernardino, California.

In the United States District Court,
Southern District, Central Division

1034-57 WB

HARSH CALIFORNIA CORPORATION, a California corporation,

Plaintiff,

vs.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic; S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as Members of and Constituting the Board of Supervisors of the County of San Bernardino, P. W. NICHOLS, County Auditor of the County of San Bernardino, G. LEON GREGORY, Tax Collector of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION, AND RESTRAINING ORDER

Comes Now the plaintiff herein and for cause of action against the above-named defendants, alleges as follows:

I.

That the plaintiff is, and at all times mentioned herein has been, a corporation organized and exist-

ing under and by virtue of the laws of the State of California with its principal place of business in the County of San Bernardino, State of California;

That the County of San Bernardino is, and at all times mentioned herein has been, a body corporate and politic; that S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith are, and at all times mentioned herein were, the duly appointed and/or elected, qualified and acting members of the Board of Supervisors of the County of San Bernardino, State of California;

That P. W. Nichols is, and at all times mentioned herein was the duly appointed and acting County Auditor of the County of San Bernardino; that G. Leon Gregory is, and at all times mentioned herein was, the duly appointed and acting County Tax Collector of the County of San Bernardino; that Albert E. Weller is, and at all times mentioned herein was, the duly appointed and acting County Counsel of the County of San Bernardino, State of California.

II.

That the plaintiff herein is the lessee of certain real property and improvements owned by the United States of America located at which is generally known as the Barstow Marine Corps Supply Center, Barstow, California, pursuant to a lease from the United States of America, Defense Department, Department of the Navy; executed pursuant to the National Housing Act (63 Stat. 571; 12 USC 1748) as amended;

That a true and correct copy of said lease is

attached hereto, marked Exhibit "A" and made a part of this complaint as if set forth in full at this point;

That the County of San Bernardino did cause to be made an assessment of the possessory interest and all other right, title and interest in and to the improvements located on land described in lease recorded in Book 3168, page 527, Official Records of the County of San Bernardino under Code Area 5601 and as Parcel 05436178, on the assessment or tax roll for the said County of San Bernardino for the tax year 1957-58 and did extend and levy taxes thereon against the said "possessory interest and all other right, title and interest" of plaintiff taxes in the total sum of $21,388.00;

That on or about August 1, 1957, defendant Tax Collector of the County of San Bernardino did cause to be prepared and issued a tax statement on the aforesaid assessment, issued to plaintiff and did deliver the said statement to plaintiff and did demand of plaintiff the payment of the said taxes on or before August 31, 1957, under threat of punishment for refusal so to do by seizure and sale of plaintiff's leasehold interest under and by virtue of its lease from the United States of America together with penalties in the amount of 8 per cent of the aforesaid assessment or the sum of $1,711.04; that a true and correct copy of said statement, demand and threat is attached hereto, marked Exhibit "B" and made a part of this complaint as if set forth in full at this point;

That under the provisions of Section 408 of the

Housing Act of 1955 as amended by Section 511 of the Housing Act of 1956 (Pub. Law 1020, 70 Stat. 1110) it is expressly provided that:

"Nothing contained in the provisions of Title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property."

That pursuant to the provisions of the aforesaid law, the Secretary of Defense did issue its Department of Defense Directive No. 4165.30 of November 16, 1956, and Department of Navy Instruction No.

11101.29 of June 3, 1957, and Bureau of Yards and Docks Instruction No. 11101.42 of July 12, 1957, which directed and provided that the designee of the Secretary of Defense for this purpose, as to the aforesaid lease to plaintiff, was A. D. Hunter, Captain, CEC, U.S.N., District Public Works Officer for the Eleventh Naval District, Department of the Navy of the United States of America;

That pursuant to the aforesaid directives, the said Captain A. D. Hunter did, in accordance with law and in the manner provided, determine that the payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property (without regard to the amounts as may be appropriate for any other expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting or any other service or facility which are customarily provided by the State, county, city, or other local taxing authority with respect to other similar property) was in the amount of $27,759.00 for the tax year 1957-58;

That attached hereto and made a part hereof as Exhibit "C" is a true and correct copy of said letter of notification to the defendant Board of Supervisors of the County of San Bernardino together with the determination aforesaid delivered to said Board of Supervisors on August 13, 1957, and the whole thereof is made a part hereof as if set forth in full herein at this point; that as set forth in said determination the said designee of

the Secretary of Defense, to wit, Captain A. D. Hunter, did find that the Federal Government had contributed to the maintenance of operation of schools for which taxes are collected from plaintiff by the said defendant County Tax Collector of the County of San Bernardino, the sum of $22,934.00 and that in addition thereto did contribute in school construction for the said aforesaid schools the additional sum of $4,825.00 or the total sum of $27,759.00.

III.

That the amount of the aforesaid offset and deduction determined as aforesaid by the said Captain A. D. Hunter, District Public Works Officer for the Eleventh Naval District, Department of the Navy of the United States of America, under and pursuant to the provisions of Section 408 of the Housing Act of 1955, as amended, exceeds, and at all times mentioned herein has exceeded, the claimed amount of local taxes on the said possessory interest of plaintiff under the aforesaid lease by the sum of $6,371.00 and by virtue of such fact there is no sum now due, owing or unpaid by plaintiff on account of local taxes or assessments to defendant County of San Bernardino or any of the public entities for which said County collects taxes for the tax year 1957-58 by reason of the aforesaid "possessory interest and all right, title and interest" of plaintiff under and by virtue of the aforesaid lease from the United States of America.

IV.

That the said letter together with the determination were received by the said Board of Supervisors and the members thereof on or about August 14, 1957; that in addition thereto plaintiff did on August 15, 1957, make demand that the said defendants comply with the said determination and allow the necessary offset and did forward in addition thereto a copy of the said determination to the said Board of Supervisors; said demand was received by the said Board of Supervisors on or about August 16, 1957; that a true and correct copy of said demand is attached hereto as Exhibit "D" and made a part hereof as if set forth in full at this point.

V.

That despite the aforesaid determination of the designee of the Secretary of Defense acting pursuant to the provisions of Section 408 of the Housing Act of 1955, as amended, defendant County of San Bernardino and defendants S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith as members of, and constituting the Board of Supervisors of said County, defendant P. W. Nichols as County Auditor, defendant G. Leon Gregory as County Tax Collector and defendant Albert E. Weller as County Counsel, and each and all of them have failed, refused and neglected and still fail, refuse and neglect to cancel the aforesaid local assessment or tax to plaintiff in the sum of $21,388.00 for the tax year 1957-58.

all as set forth in the provisions of Sections 4986 to 4994 inclusive, of the Revenue and Taxation Code of the State of California, as being erroneous, illegal or void and constituting less than the amount of offset or deduction required to be charged against said assessment or tax by the aforesaid paramount Federal law, to wit, Section 408 of the Housing Act of 1955, as amended, and have failed, refused and neglected and still fail, refuse and neglect to determine as provied in said provision of the Revenue and Taxation Code of the State of California, as a matter of record in said County that there is not now due, owing or unpaid from plaintiff to defendant County or to defendant G. Leon Gregory as its County Tax Collector any sum whatsoever by virtue of said assessment or taxes under and by virtue of the superseding effect of said Federal law and the aforesaid binding determination of said designee of the Secretary of Defense made thereunder.

VI.

That by virtue of the foregoing determination by the aforesaid Captain A. D. Hunter, acting for and as designee of the Secretary of Defense, and under the provisions of Section 4986 of the Revenue and Taxation Code of the State of California, defendants S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith, as members of and constituting the Board of Supervisors of defendant County have had "satisfactory proof" that the aforesaid taxes for the tax year 1957-58 claimed to be due on plaintiff's "possessory interest" under

and by virtue of the aforesaid lease from the United States of America are "erroneously" and "illegally" charged against plaintiff and under the aforesaid provisions of said Revenue and Taxation Code they are thereby under a duty, having first had the "written consent" of defendant County so to do, to order defendant P. W. Nichols as County Auditor to cancel the aforesaid taxes;

That by virtue of the aforesaid facts and provisions of said sections of the Revenue and Taxation Code of the State of California, defendant Albert E. Weller as County Counsel is under a duty to give "written consent" to such order of cancellation;

That upon receipt of such order and authorization from defendant Board of Supervisors, defendant P. W. Nichols, as County Auditor, will be under a duty to cancel and expunge from the assessment and tax roll of said County the aforesaid assessment and tax and G. Leon Gregory, as Tax Collector, will be relieved from any obligation or duty to attempt to collect or enforce such tax against plaintiff;

That although the aforesaid defendant County officers are under a present or future duty to authorize cancellation of, cancel and refrain from attempting to collect from plaintiff any tax by virtue of the aforesaid assessment to it on "its possessory interest and all right, title and interest" under and by virtue of the aforesaid lease from the United States of America, nevertheless plaintiff, as a private citizen and taxpayer from and after May 2,

1950, the date of the final decision of the California Supreme Court in Security First National Bank v. Board of Supervisors, 35 Cal. 2d 323; 217 P. 2d 948, has no right or power to compel performance of such duty and under the law of the State of California has no right, remedy or power of any kind whatsoever to require performance of such duty and recognition by defendants of the effect of such valid determination as to offset any deduction all as provided by the provisions of the aforesaid Federal Statute here involved, to wit, Section 408 of the Housing Act of 1955, as amended;

That the only laws of the State of California which permit an immediate determination as to validity in a court of law applicable to local taxes and assessments are the provisions of Sections 5136 to 5143, respectively, of the Revenue and Taxation Code of the State of California; that such provisions permit a taxpayer to pay a tax under protest only when the whole "assessment" or "a portion" of the assessment as originally made by the County Assessor is claimed by such protestant to be "void" in whole or in part;

That the assessment of plaintiff's "possessory interest and all right, title and interest" under and by virtue of the aforesaid lease from the United States of America was not illegal, erroneous or void in whole or in part when made by the County Assessor of defendant County and its erroneousness and illegality arise solely by virtue of the fact that subsequent to the making of such assessment the aforesaid determination was made by the aforesaid

Captain A. D. Hunter as designee of the Secretary of Defense of the aforesaid offset and deduction under the provisions of Section 408 of the Housing Act of 1955, as amended; that by reason thereof plaintiff has no remedy or right in the law of the State of California to bring any suit for recovery of such tax under the protest provisions of the aforesaid Revenue and Taxation Code;

That the only other remedy or right of a local taxpayer to secure a determination as to the validity of a local tax or assessment under the law of California is by virtue of the provisions of Sections 5096-5107 of the Revenue and Taxation Code of the State of California which require any taxpayer seeking to recover a tax erroneously or illegally collected from him first to file a refund claim therefor with the Board of Supervisors and, until such claim has first been denied, or a period of six months inaction thereafter has elapsed, the taxpayer has no right to have said matter adjudicated as to its legality in any court of law;

That as set forth on the tax statement delivered by defendant Tax Collector to plaintiff, (Exhibit "C"), if plaintiff does not pay the claimed taxes on or before August 31, 1957, it will become liable to a penalty thereon in the amount of 8 per cent thereof, or the sum of $1,711.04, and to immediate seizure and sale by said Tax Collector of plaintiff's leasehold estate as aforesaid under and by virtue of its lease from the United States of America;

That by reason of each and all of the aforesaid, plaintiff has no plain, adequate and speedy remedy

of law in the courts of the State of California for the determination of the effect of the aforesaid determination of offset and deduction against its local taxes made as aforesaid by Captain A. D. Hunter, acting as designee of the Secretary of Defense under the provisions of Section 408 of the Housing Act of 1955, as amended.

VII.

That this is a suit of a civil nature where the matter in controversy, exclusive of interests and costs, exceeds the sum of $3,000.00 and there exists an actual controversy within the meaning of Section 2201, Title 28 of the U. S. Code between plaintiff and defendants as to the force and effect of the offset or deduction from local assessments and taxes authorized and required by Section 408 of the Housing Act of 1955 as amended by Section 511 of the Housing Act of 1956 (Pub. Law 1020, 70 Stat. 1110) when such local assessments and taxes are levied on the "possessory interest and all other right, title and interest" of plaintiff under and by virtue of its lease of certain government lands and buildings, said lease, having been executed to the provisions of title VIII of the National Housing Act. Jurisdiction is founded on Title 28, Section 1331.

Wherefore, plaintiff prays as follows:

1. That this Court declare that the offset and deduction in the sum of $27,759.00, as determined, pursuant to Section 408 of the National Housing

Act of 1955 as amended, by the designee of the Secretary of Defense to have been expended by the United States of America with respect to such property is a valid and complete offset and deduction from 1957-58 taxes claimed by defendant County to be owing to it from plaintiff in the sum of $21,388.00 on account of plaintiff's "possessory interest and all other right, title and interest" arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States, and that therefore there is no sum at all due, owing or unpaid to defendant County from plaintiff on account of said 1957-58 taxes.

2. That this Court permanently enjoin and restrain the defendants, County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, and each of them, their agents, servants, employees, attorneys and all persons in active consort, and in participation, with them from doing any and all acts to enforce the said tax in the sum of $21,388.00 or any part thereof or to enforce any penalty against plaintiff or doing any other acts in connection therewith saving and excepting as follows:

a. As to defendants S. Wesley Break, Daniel

Mikesell, Magda Lawson, Paul Young and Nancy Smith as members of and constituting the Board of Supervisors of the County of San Bernardino to cancel the said tax in accordance with the provisions of Section 4986 of the Revenue and Taxation Code of the State of California;

b. As to defendant Albert E. Weller as County Counsel of the County of San Bernardino to give "written consent" to said Board of Supervisors for such cancellation;

c. As to defendant P. W. Nichols as County Auditor of the County of San Bernardino to cancel such tax and assessment on the assessment and tax roll of the County of San Bernardino for the tax year 1957-58;

3. That pending the final hearing and determination of this cause upon its merits, the Court issue a temporary restraining order restraining the defendant and each and all of them from doing any and all acts to enforce or collect the alleged tax on plaintiff's "possessory interest and all other right, title and interest" in the aforesaid lease from the United States of America in the sum of $21,388.00 or any part thereof;

4. That the plaintiff have judgment for its costs of suit and for such other and further relief as to the Court may seem meet and proper in the premises.

HOLBROOK TARR & O'NEILL,
By /s/ W. SUMNER HOLBROOK, JR.,
By /s/ FRANCIS H. O'NEILL,
Attorneys for Plaintiff.

EXHIBIT B

County of San Bernardino

Statement of Unsecured Property Taxes

G. Leon Gregory, County Tax Collector, Rm. 227 Courthouse, San Bernardino, California, Phone 6811

This bill when properly stamped becomes a receipt for the payment of taxes on the property described hereon for the fiscal year 1957-58.

Name of Assessee as of First Monday in March, 1957, and Address as Appears on Assessment Record:

Harsh California Corp.,
P. O. Box 991,
Portland 7, Oregon.
The Possessory Interest and All Other Right, Title and Interest in and to the Improvements Located on Land Described in Lease Recorded in Bk. 3168, Pg. 527, Official Records of County of San Bernardino.

For Information Concerning These Assessed Values and Property Assessed, Contact County Assessor, Personal Property Division, Courthouse, San Bernardino, Calif.

1957

Land:	52250
Improvements:	356180
Personal Property:	19330
Exempt:	

Net Assessed Value of Property:	427760
Solvent Credits	
Tax Rate Per $100:	500
Flood Tax:	
Special Assm't:	

Important Second Notice

This Statement Will Be Delinquent if Not Paid on or Before August 31, and Thereafter a Penalty of 8% Will Attach as Provided by Law.

Please Disregard This Notice if Payment Has Been Tendered Since August 1st.

Fiscal Year—July 1, 1957, to June 30, 1958.

Do Not Detach This Stub

1957

Give These Numbers When Inquiring About This Bill.

Code Area:	5601
Parcel:	05436178
Code Area:	5601
Parcel:	05436178

To Insure Proper Credit of Your Payment, Return Entire Tax Statement With Your Remittance. (See Para. No. 9 on Reverse Side.)

Remit Only Total and Last Amount in This Column

Total Tax:	$21,388.00
Total Tax	$21,388.00

Important Information

1. Assessment Date: Annually the Assessor shall assess all taxable property in the County to the persons owning, claiming, possessing or controlling it at 12 o'clock meridian of the first Monday in March. (Sec. 405 Revenue and Taxation Code.)

2. Declaration of Personal Property on Real Estate: Personal property to be made a lien on real estate must be declared to the Assessor prior to the last Monday in May.

3. Ownership on the Lien Date Determines the Obligation to Pay Taxes: The disposal of property after the lien date does not relieve the assessee of his tax liability.

4. Questions Concerning Assessment: All questions concerning assessment problems as concerns this tax statement should be directed to the Attention of the County Assessor, Courthouse, San Bernardino, California.

5. Taxes Due: All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied. (Sec. 2192 Revenue & Taxation Code.) The Tax Collector may enforce the collection of unsecured property taxes at any time subsequent to the entry of the tax lien on the assessment roll. (Sec. 2902 Revenue & Taxation Code.)

6. Delinquency Date: Taxes on the Unsecured Roll are delinquent if not paid on or before August

31, at 5 p.m. regardless of when the property is discovered and assessed, and thereafter a penalty of eight per cent attaches to them. (Sec. 2922 Revenue & Taxation Code.)

7. Enforcement of Payment: Taxes on the Unsecured Roll May Be Collected by Seizure and Sale of Any of the Following Property Belonging or Assessed to the Assessee: (A) Personal Property, (B) Improvements, (C) Possessory Interests. (Sec. 2914 Revenue & Taxation Code.)

8. Exemption for Military Service: Claims for military exemption must be filed with the County Assessor each year between the first Monday in March and the last Monday in May. Exemptions are applicable only to taxes accruing for the assessment year in which filing is made. Any person who claims military exemption for the first time must present evidence in support of such claim.

9. Remittances: Payments by check, cashier's check or money orders, payable to G. Leon Gregory, County Tax Collector, should be in the exact amount of the total tax due. Do not mail currency or coin. Stamps Will Not Be Accepted. A self-addressed and stamped envelope will facilitate the return of the receipt. Do Not Remove or Detach Stub from this statement as it is needed for accounting procedures and application of payment.

EXHIBIT C

District Public Works Office
Eleventh Naval District
San Diego 32, California

In Reply Refer to:
Ser 12910/DD-500
Aug. 13, 1957

Board of Supervisors,
County of San Bernardino,
San Bernardino, California.

Gentlemen:

This letter refers to taxation of the Navy Title VIII (Wherry) housing project known as Barstow Garden Homes, located at the Marine Corps Supply Center, Barstow, California (FHA No. 138-80003).

Section 408 of the Housing Amendments of 1955 as amended by Public Law 1020/84th Congress, Second Session (70 Stat. 1110) provides that:

"* * * no * * * taxes or assessments * * * on the interest of [lessees of Wherry Housing Project] shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus, (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or main-

tenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the state, county, city or other local taxing authority with respect to such other similar property: * * *"

Accordingly, there is enclosed herewith my determination in accordance with the above statutory provision, and pursuant to the authority delegated thereunder to me as the duly authorized designee of the Secretary of Defense.

Sincerely yours,

A. D. HUNTER,

Captain, CEC, USN, District
Public Works Officer.

Enclosure:

Executed Determination pursuant to Section 408 of the Housing Amendments of 1955 as amended by Public Law 1020/84th Congress.

Determination

Pursuant to Section 408 of the Housing Amendments of 1955 as Amended by Public Law 1020/84th Congress

Acting as the duly authorized designee of the Secretary of Defense, for purposes of Section 408 of the Housing Amendments of 1955 as amended, pursuant to the delegations of authority contained in Department of Defense Directive No. 4165.30 of November 16, 1956, and the Department of Navy Instruction No. 11101.29 of June 3, 1957, and the Bureau of Yards and Docks Instruction No.

11101.42 of July 12, 1957, I hereby determine the sum of $27,759.00 to be the amount equal to the sum of payments made by the Federal Government to the County of San Bernardino, California, with respect to the Navy Title VIII (Wherry) housing project known as Barstow Garden Homes (FHA No. 138-80003), applicable to the 1957-58 tax year.

Note: The absence from this determination of a statement of the expenditures made by the Federal Government or by the lessee for the provision or maintenance of other public services or facilities which are customarily provided with respect to such other similar property shall not be construed to preclude their inclusion in future determinations.

The above total is comprised of the following items:

A. Capital Improvements	
School construction (FL 815 aid) (interest and amortization for 1 year)	$ 4,825.00
B. Maintenance and Operation	
Schools (FL 874 aid)	22,934.00
Total Deductions	$27,759.00

Signed this 9th day of August, 1957.

/s/ A. D. HUNTER,
Captain, CEC, USN, District Public Works Officer,
Eleventh Naval District.

EXHIBIT D

Harold Schnitzer, President

Phone: BRoadway 3405

Harsh California Corp.

Managers of:

Barstow Marine Corps
Housing Project
Barstow, California
FHA Project No. 138-80003-Navy-1

Home Office
S. W. Twelfth & Clay Streets
Portland 1, Oregon
P. O. Box 991, Portland 7, Oregon

August 15, 1957

Board of Supervisors
County of San Bernardino
San Bernardino, California

Gentlemen:

On August 13, 1957, Captain A. D. Hunter, District Public Works officer, Eleventh Naval District, advised your office that a determination had been made by the Department of Defense of the credit due against taxes assessed on the Barstow Wherry Housing Project at Barstow, California. This credit has been determined pursuant to Section 408, of the Housing Amendments of 1955 as amended by Public Law 1020 of the 84th Congress.

We enclose a copy of the determination made by the Department of the Navy although you have received such a determination directly from them.

This determination indicates a deduction of $27,-759.00 which is to be offset against the total tax bill for the fiscal year July 1, 1957 to June 30, 1958 in the amount of $21,388.00.

This letter will constitute our written demand on the County of San Bernardino to give full recognition to the determination of the tax credit made by the Department of Defense which in our case eliminates the tax against the Barstow Wherry Project for the fiscal year July 1, 1957 to June 30, 1958.

Very truly yours,

HARSH CALIFORNIA CORPORATION,

HAROLD J. SCHNITZER,
President.

HJS:md

CC: Federal Housing Administration, Los Angeles, California; Federal National Mortgage Association, Los Angeles, California; District Public Works Office, San Diego, California.

Duly verified.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified complaint of plaintiff in this action, it appears to the satisfaction of the Court from said Complaint that this is a proper case for issuance of an Order directed to

defendants, County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, to show cause why they should not be restrained and enjoined in accordance with the prayer of said plaintiff.

It Is Therefore Ordered pursuant to the provisions of Federal Rule of Civil Procedure 65(a) that said defendants and each and all of them appear before this Court in the Court Room of the Honorable Wm. C. Byrne, District Judge, in the United States Courthouse, at Los Angeles, California, at 9:45 o'clock in the a.m., or as soon thereafter as counsel can be heard, on September 6, 1957, then and there to show cause, if any, why a preliminary injunction should not be issued pending the trial of this action, as follows:

(a) That this Court declare that the offset and deduction in the sum of $27,759.00, as determined pursuant to Section 408 of the National Housing Act of 1955 as amended, by the designee of the Secretary of Defense to have been expended by the United States of America with respect to such property is a valid and complete offset and deduction from 1957-58 taxes claimed by defendant County to be owing to it from plaintiff in the sum of $21,388.00 on account of plaintiff's "possessory

interest and all other right, title and interest" arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States, and that therefore there is no sum at all due, owing or unpaid to defendant County from plaintiff on account of said 1957-58 taxes.

(b) That this Court permanently enjoin and restrain the defendants County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, and each of them, their agents, servants, employees, attorneys and all persons in active consort, and in participation with them, from doing any and all acts to enforce the said tax in the sum of $21,388.00 or any part thereof or to enforce any penalty against plaintiff or doing any other acts in connection therewith saving and excepting as follows:

1. As to defendants S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith as members of and constituting the Board of Supervisors of the County of San Bernardino to cancel the said tax in accordance with the provisions of Section 4986 of the Revenue and Taxation Code of the State of California;

2. As to defendant Albert E. Weller as County Counsel of the County of San Bernardino to give "written consent" to said Board of Supervisors for such cancellation;

3. As to defendant P. W. Nichols as County Auditor of the County of San Bernardino to cancel such tax and assessment on the assessment and tax roll of the County of San Bernardino for the tax year 1947-58;

(c) That the plaintiff have judgment for its costs of suit and for such other and further relief as to the Court may seem meet and proper in the premises.

It Is Further Ordered that a copy of the Complaint herein and the Memorandum of Points and Authorities, filed concurrently herewith, and a copy of this Order be served on each of the defendants herein, at least 8 days before the date on which said defendants are ordered to appear before this Court to show cause as herein provided.

Dated Aug. 30, 1957.

Presented by:

HOLBROOK, TARR &
O'NEILL,

By /s/ W. SUMNER HOLBROOK, Jr.
By /s/ FRANCIS H. O'NEILL.

/s/ BEN HARRISON,
District Judge.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER

It appearing to the Court that the defendants are about to commit the acts hereinafter referred to and that they will do so unless restrained by order of this Court and that immediate and irreparable injury, loss and damage will result to plaintiff before notice can be heard and a hearing had on plaintiff's motion for a preliminary injunction in that the claimed taxes in the sum of $21,388.00 are delinquent if not paid on or before August 31, 1957, and a penalty of eight (8%) per cent of said sum or the amount of $1,711.04, will be claimed in addition thereto and defendant County will attempt to seize and sell plaintiff's leasehold estate under and by virtue of its lease from the United States of America for nonpayment of such tax.

It Is Ordered that defendants County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, and each of them, their agents, servants, employees, attorneys and all persons in active consort, and in participation, with them be, and they hereby are, restrained from taking any steps whatever leading to the enforcement or col-

lection of said claimed tax in the amount of $21,-388.00;

And whereas the full sum of this claim in the amount of $21,388.00 plus penalties is impounded in escrow by the Federal National Mortgage Association pending instructions that it be or not be turned over to the County Tax Collector, that this temporary restraint is on condition that bond be filed by plaintiff in the sum of $2000.00; and

It Is Further Ordered that this Order expire within 10 days after entry unless in such time the order for good cause shown is extended for a like period or unless the defendants consent that it may be extended for a longer period; and

It Is Further Ordered that plaintiff's application for a preliminary injunction be set down for hearing before the Honorable Wm. C. Byrne, Judge of this Court, on Sept. 6, 1957, at 9:45 o'clock a.m.

Issued at 3:40 p.m. on Aug. 30, 1957.

/s/ BEN HARRISON,
Judge of the United States
District Court.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) FEDERAL RULES CIVIL PROCEDURE

Defendants respectfully request the Court to dismiss the above-entitled action pursuant to Rule

12(b), subsection 6, of the Rules of Civil Procedure, upon the ground that plaintiffs have not stated a claim upon which relief can be granted.

Injunctive Relief

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

* * *

Plaintiff has two plain, adequate and speedy remedies at law in the courts of the State of California. He is therefore not entitled to injunctive relief, nor to declaratory relief, nor to any other Federal remedy. The cause should be dismissed.

Dated.....

ALBERT E. WELLER,
County Counsel;

/s/ J. B. LAWRENCE,
Deputy, Attorneys for
Defendants.

/s/ KENNETH CLEAVER,
Of Counsel.

Affidavit of service by mail attached.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Oct. 14, 1957.
At: Los Angeles, Calif.
Present: Hon. Wm. M. Byrne, District Judge;
Deputy Clerk: Chas. E. Jones;
Reporter: Samuel Goldstein;
Counsel for Plaintiff: W. Sumner Holbrook, Jr.;
Francis H. O'Neill;
Counsel for Defendants: J. B. Lawrence.

Proceedings: For hearing motion to dismiss complaint.

At request of plaintiff the complaint is amended by interlineation by adding at the end of paragraph 7 "jurisdiction is founded upon Title 28, Sec. 1331."

It Is Ordered that the temporary restraining order is continued until Oct. 17, 1957.

It Is Ordered that cause is continued to Oct. 17, 1957, 9:45 a.m., for further hearing on motion to dismiss.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy Clerk.

WB—10/14/57.

DOCUMENTS LODGED WITH COURT

Military Housing

Enactment of the proposed measure would result in no additional cost to the Government.

This report has been coordinated within the National Military Establishment in accordance with procedures prescribed by the Secretary of Defense.

The Navy Department has been advised by the Bureau of the Budget that there is no objection to the submission of this proposed legislation to the Congress.

Sincerely yours,

JOHN T. KOEHLER,
Acting Secretary of the Navy.

Military Housing

For text of Act see p. 582

Senate Report No. 410, May 20, 1949 [to accompany S. 1184]. House Report No. 854, June 20, 1949 [to accompany S. 1184].

The House Report repeats in substance the Senate Report

House Report No. 854

The Committee on Banking and Currency, to whom was referred the bill (S. 1184) to encourage construction of rental housing on or in areas adjacent to Army, Navy, Marine Corps, and Air Force installations, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

General Statement

The purpose of the bill is to encourage private

enterprise to construct rental housing to serve the needs of personnel at military installations, primarily through (1) the provision of a special form of mortgage insurance designed to meet the particular problems involved, (2) the leasing of sites by the Military Establishment free from the right of revocation, and (3) the provision of utility services by the Military Establishment on a long-term basis.

Under existing legislation there is no specific authority which permits the Federal Housing Administration to assist in the financing of housing to serve the personnel of military installations on any different basis than other housing not related to military personnel. Consequently, in analyzing proposed projects to provide housing for military personnel, the FHA cannot disregard the special risks involved by reason of the location and the question as to the permanent nature of the military installations.

The bill would amend the National Housing Act by providing for a new title establishing a system of mortgage insurance for rental housing to serve the personnel of military and naval installations on substantially the same basis as is now available under section 608 of title VI. In view of the special problems involved and the different risk characteristics presented by such housing, an entirely new insurance fund is proposed for the operation of this new title.

The primary difference between the mortgage insurance proposed under this new title VIII and that available under section 608 is that the bill does

not require the Commissioner to make a determination of acceptable risk. In lieu of such a determination, this bill would permit the Commissioner to accept a certification from the Military Establishment that the housing is necessary, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to curtail substantially the activities at such installation.

Since the need for the housing and all information in regard to the permanency of the military installation are matters peculiarly within the knowledge of the military, the FHA should not be required to make a determination of acceptable risk, but should be permitted to accept such certification as determination of the need for the housing and the probability of the permanency of the installation. The FHA, nevertheless, would require the proposed project to demonstrate a rental income sufficient to pay operating and debt-service charges, and would also require the project to meet sound standards of construction, design, and livability.

The provisions of the bill would authorize the Military Establishment to lease or sell lands to builders of housing at military installations. In the case of leases of building sites, the leases (which would be for a period of not less than 50 years to run from the date the mortgage on the leasehold is executed) could be made without regard to the existing limitation with respect to right of revocation by the Government in the event of the declaration of a national emergency. The existing right of

revocation is of course a prohibitive obstacle to private mortgagee participation in such building. Also, difficulties in obtaining suitable sites is frequently a deterrent to the development of housing by private enterprise in the vicinity of military installations, particularly in isolated areas. The leasing of such sites by the Military Establishment at nominal considerations would further make possible the achievement of lower rentals for the personnel of the establishment. In the case of sales of building sites at military establishments whenever the Secretary of the Army, Navy, or Air Force determined that it would be in the interest of national defense to do so he could sell at fair value as determined by him any interest in real property under his jurisdiction, notwithstanding any limitations or requirements of law with respect to use or disposition of such property.

Lack of adequate utility facilities, particularly in the isolated areas, can be a serious obstacle to the development of housing by private enterprise in the vicinity of military installations. In some cases the only utilities available are those located on the military installation itself. To overcome this obstacle the bill would provide that the Secretary of the Army, Navy, or Air Force would be authorized to sell and contract to sell to purchasers within, or in the immediate vicinity of military installations, such utilities and related services as are not otherwise available from local private or public sources. The utilities and related services authorized to be sold are electric power, steam, compressed air,

water, sewage and garbage disposal services, gas, ice, mechanical refrigeration, and telephone service. As noted above, however, any utility or related service provided and sold under this authority shall not be so provided unless it is determined that the utility or related service is not at the time of such sale or contract to sell, available from a private or other public source, and that the furnishing thereof is in the interest of national defense.

As heretofore stated, the mortgage insurance under this proposed new title is substantially the same as is now available under section 608 of title VI. The bill provides a mortgage limitation of $5,000,000, and not to exceed 90 per cent of the Commissioner's estimate of the replacement cost, and not to exceed $8,100 per family unit for such part of such property or project as may be attributable to dwelling use. These provisions are comparable to the existing limitations provided in section 608 and from the experience of FHA in mortgage insurance under section 608, such mortgage amounts should be adequate to interest builders and private capital in the production of such projects. The maximum interest rate is fixed at 4 per cent. Mortgages insured under this new title would be eligible for secondary market purchase by the Federal National Mortgage Association.

To provide for the insurance of military housing mortgages there would be created a military housing insurance fund to which there would be authorized to be appropriated the sum of $10,000,000. For immediate needs pending such appropriation, the Com-

missioner would be directed to transfer the sum of $1,000,000 to such fund from the war housing insurance fund created by section 602 of the National Housing Act, as amended, and such amount would be reimbursed to the war housing insurance fund upon the availability of the appropriation authorized. The insurance fund would be supported by premium charges for the insurance of mortgages which the Commissioner is authorized to fix at an amount equivalent to not less than one-half of 1 per cent per annum nor more than an amount equivalent to 1½ per cent per annum of the amount of the principal obligation of the mortgage outstanding at any time, without taking into account delinquent payments or prepayments.

The aggregate amount of principal obligations of all mortgages insured under the military housing insurance fund would be limited to $500,000,000 except that with the approval of the President such aggregate amount could be increased to not to exceed $1,000,000,000. Further, the military housing insurance fund could not be used to insure mortgages after July 1, 1951, except pursuant to a commitment to insure issued on or before such date or a mortgage given to refinance an existing mortgage insured by the fund and which does not exceed the original principal amount and unexpired term of such existing mortgage.

In order to adequately protect holders of mortgages insured under the provisions of this bill from subsequent action by the United States to acquire title to the mortgaged property, provision would be

made that if during the time the mortgage is insured and before the mortgagee has received the benefits of insurance, the United States acquires, or commences eminent domain proceedings to acquire the mortgaged property for the use of the National Military Establishment, the mortgagee may, at its election receive the benefits of the insurance as provided notwithstanding the fact that the mortgage may not be in default.

Representatives of the three branches of the National Military Establishment, appearing before your committee, strongly urged the enactment of this measure. They stressed, in terms of the efficiency of the armed services, the urgent need for adequate housing facilities to serve families of their personnel. They made it abundantly clear that, to attract and hold the highly trained, experienced, and technical personnel now required by the Departments of the Army, the Navy, and the Air Force, it is essential that this personnel be afforded an opportunity to live comfortable and normal lives, insofar as military duty permits, on a reasonable parity in terms of housing, with the average American citizen. The fact that most of them do not now have this privilege is a major contributing factor to the existence of a morale problem that bears on the effectiveness of our armed forces, to the difficulties in recruiting able men, and to the large percentage of trained men who are failing to re-enlist at the expiration of their enlistment terms.

Adequately training men to maintain and operate our present-day intricate war machines is an exten-

sive and costly undertaking. Whenever a trained man fails to re-enlist, the investment of the Government in his training is lost to the armed services involved and another man must be given similar training. The Air Force in September 1948 made an analysis of its enlisted personnel which indicated that only 59 per cent of all married enlisted personnel intended to re-enlist. However, 79 per cent indicated that they would re-enlist if the Government were to provide family housing. Those failing to re-enlist include some of the best trained and most able men.

Normally the housing units needed at each installation would be supplied through the construction of public quarters by the military forces. However, meeting this present need in its entirety through the use of public funds would require a tremendous direct expenditure by the Federal Government. It is therefore extremely important that private builders be encouraged to construct as much of this housing as possible.

The bill is designed to encourage them to construct such housing. Where housing is constructed with mortgage insurance under the bill, no cost to the Government would be involved unless, through deactivation or curtailment of military installations or other causes there are losses in excess of the premium and other payments by the mortgagee to the insurance fund. In any event, such losses would not approach the cost of construction by the Federal Government.

Testimony presented to the committee emphasized

that housing constructed with mortgage insurance under this bill cannot possibly meet more than a portion of the military housing need either in terms of total units required or in terms of desirable rent levels. However, such mortgage insurance should encourage the production of substantial additions to the housing supply available to personnel at military installations and at rentals comparable to or lower than those which many of them are now paying for inadequate quarters. Such private-housing developments should increasingly free and make available to enlisted personnel and junior officers the existing public quarters on military installations.

Title II and Title VI Mortgage Insurance

Authorization

Section 6 of the bill, added by your committee, would increase by $500,000,000 the total mortgage insurance authorization for title II of the National Housing Act. Of this sum $300,000,000 would be available immediately, and $200,000,000 additional would be available with the approval of the President. This title provides for the regular, permanent mortgage insurance program of the FHA for both sales and rental housing. As the authorization is now almost exhausted, it is essential that an increase be granted promptly in order that needed housing construction will not be delayed. The increase contained in section 6 of the bill is not intended to provide the full amount needed, but will prevent delay in mortgage insurance operations under title II

until your committee has had an opportunity to examine fully a request for a larger amount.

Subsection (b) of section 6 of the bill would continue the mortgage insurance authorization under section 608 of title VI from June 30, 1949, until August 31, 1949. In view of the fact that nearly all of the multiple unit rental insurance under the FHA program is done under this section and in view of the continuing need for rental accommodations throughout the country, the committee deems it necessary to provide for this interim extension until it has an opportunity to consider the bills before it dealing with amendments to the National Housing Act in general.

Section-By-Section Analysis of the Bill as Amended

Section I:

This section would add a new title VIII to the National Housing Act, as amended. This new title VIII providing for military housing insurance would be comprised of eight sections numbered 801 to 808, inclusive.

The terms used in this new title VIII would be defined in section 801. The definitions are similar to those in other titles of the National Housing Act except that a definition of the term "military" is added to make it clear that the term includes the Army, Navy, Marine Corps, and Air Force.

A military housing insurance fund of $10,000,000 would be created by section 802 for use by the Federal Housing Commissioner as a re-

84th Congress, 2d Session
House Report No. 2363

Housing Act of 1956

Report
of the
Committee on Banking and Currency
House of Representatives
Eighty-Fourth Congress
Second Session

on H. R. 11742

[Seal]

June 15, 1956—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

United States Government Printing Office
Washington: 1956

78813

Taxation of Wherry Act Leaseholds

The bill would clarify congressional intent with respect to the rights of local communities to tax the interests of mortgagors under the Wherry Act mortgage insurance program (title VIII of the National Housing Act prior to the Housing Amendments of 1955) who have leased the mortgaged property from the United States. Under this program rental housing was provided for military and civilian personnel at or in areas adjacent to military installations. Most of this housing was built on land

owned by the Department of Defense and leased to the mortgagor corporation. As of May 1, 1956, the FHA had insured mortgages on 272 Wherry Act housing projects and the total of those mortgages amounted to about $391 million. State and local taxes are paid on more than half of these projects, although the extent of the payments often vary because of local circumstances other than the tax rate or value of the property.

Section 603 of the bill would expressly provide that nothing contained in title VIII or other law shall be construed to exempt from State or local taxes or assessments any right, title, or other interest of a lessee from the Federal Government with respect to any property covered by a mortgage insured under that title. However, the section would provide that any such taxes or assessments must be reduced (from the amount otherwise levied or charged) by such amount as the Federal Housing Commissioner determines to be equal to (1) any payments in lieu of taxes made by the Federal Government to the local taxing bodies with respect to the property plus (2) any expenditures made by the Federal Government for streets, utilities, and other services for or with respect to the property. For purpose of these deductions, initial capital expenditures by the Federal Government for the services referred to could be allocated over such period of years as the Commissioner determined to be appropriate.

It would thus be made clear that States and communities under adequate State tax statutes, would

be able to obtain from Wherry Act projects taxes and assessments which, with payments and expenditures by the Federal Government for services in connection with the projects, would equal the taxes and assessments collected by the local taxing officials from other similar property.

The need for a clarification of this matter has existed since the initiation of the Wherry Act program because of the doubtful validity and effectiveness of various tax statutes of the States as applied to the interests of the mortgagor corporations where the projects are located on lands owned by the United States. The problem has involved the major constitutional question of the right of States to tax the mortgagor's leasehold interest, and has been complicated by the large variety of statutes in the individual States which local taxing officials have attempted to apply to the mortgagor's interests. There has been a substantial amount of litigation on this matter in State and lower Federal courts over the period of the program without uniformly resolving the questions involved. The recent decision of the Supreme Court of the United States in the case of Offutt Housing Company v. County of Sarpy (May 28, 1956) upheld the right of local taxing officials in the State of Nebraska to levy certain State and county "personal property" taxes against the lessee's interest in a title VIII project, measured by the full value of the buildings and improvements. However, as a large portion of the projects have not been subject to State and local taxes, payments in lieu of taxes have frequently

been made to local taxing officials in exchange for usual services, such as schools, furnished to the projects. Also, many expenditures have been made by the Federal Government for streets, utilities, schools, and other services normally furnished by taxing bodies. As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, it is important that no payments be made to communities which would constitute a windfall over and above normal taxes. Consequently, it is very important to assure that the project does not duplicate payments for services furnished to it. This duplication would be avoided under the provision in the bill for deductions from tax payments, as explained above.

Title VII—Miscellaneous

Farm Housing

Your committee is concerned over the substandard quality of much of the Nation's farm housing and over the difficulty many farmers face in obtaining adequate long-term housing credit at a reasonable cost. The most recent Census of Housing (1950) showed that 20 per cent of farm houses are in such a dilapidated condition that they need to be replaced or are in need of major repair; in contrast, less than 7 per cent of urban homes were classified as dilapidated.

The inadequacy of farm housing was serious in 1950 when farm income reflected 100 per cent of parity. With net farm income down nearly $4 bil-

lion since 1952, the difficulties facing many farm families in their attempts to correct farm housing deficiencies have multiplied.

To help meet this problem, section 701 of the bill would extend title V of the Housing Act of 1949 to provide for a 5-year farm housing program. Specifically, the bill would authorize (1) $450 million for direct farm housing loans to be available during a 5-year period; (2) an additional $10 million for contributions by the Secretary of Agriculture to prevent defaults in payments on loans for potentially adequate farms; and (3) an additional $50 million for grants and loans for improvements and repair to keep houses safe and sanitary and also to encourage family-size farms.

Your committee deeply regrets the administration's failure to implement the farm housing loan program under title V of the Housing Act of 1949. Despite consistent action each year on the part of Congress to extend the title V farm housing loan program, the program has been made a dead letter through administrative inaction and neglect. No loans have been made under the program since December, 1953, and your committee notes that a recent supplemental request on the part of the administration for $5 million to be used for fiscal 1956 will fall woefully short of meeting farm housing needs since such a sum would provide loans for only an estimated 830 farm families.

Your committee believes that an effective direct lending program under title V is a needed supplement to the farm housing loans available under title

I of the Bankhead-Jones Act. The loans under the Bankhead-Jones Act meet an important part of farm housing need, but they do not reach all of the area of need by any means. Loans under title I of the Bankhead-Jones Act are limited to owners of

Department of the Navy
Bureau of Yards and Docks

Washington 25, D. C.

Budocks 11011.42
C-540A/etj
12 July, 1957

Budocks Instruction 11011.42

From: Chief, Bureau of Yards and Docks
To: Distribution List

Subj.: Tax Deduction Determinations on Navy Wherry Housing Projects.

Ref:

(a). Sec. 408 of the Housing Amendments of 1955, as amended by Public Law 1020/84th Congress (70 Stat. 1110)

(b). DOD Directive No. 4165.30 dated 16 Nov., 1956

(c). DOD Instruction No. 4165.32 dated 27 Dec., 1956.

(d). U. S. Supreme Court Decision: Offutt Housing Co. v. County of Sarpy (Nebr.): 351 U. S. 253

(e). BuDocks Instruction 11101.12 dated 25 November, 1952

(f). Chapter 3 of NavDocks TP-AD-3 (as revised)

Encl.:

(1). SecNav Instruction 11101.29 of 3 June, 1957

(2). FHA Military Housing Letter No. 101 of 31 May, 1957

(3). Tax Deduction Determination Form

(4). Form of letter transmitting Determination to sponsor

(5). Form of letter transmitting Determination to the local Taxing Authority

(6). Form of letter transmitting Determination to the mortgagee

(7). Form of letter transmitting Determination to the cognizant FHA Field Director

(8). Tax deduction data Analysis and Report Form

1. Purpose. The purpose of this Instruction is to:

a. Implement references (a), (b), and (c), and enclosure (1).

b. Delegate certain authority vested in the Chief of the Bureau of Yards and Docks by enclosure (1).

c. Cancel reference (e) and promulgate revised policies and procedures in consonance with those contained in references (b) and (c) and enclosure (1).

d. Supplement the Instructions contained in reference (f) concerning the subject tax deduction determinations.

2. Cancellation. Reference (e) is hereby cancelled and superseded.

3. Background. References (e) and (f) pointed up the Navy's basic objective to minimize the impact of possible taxation of Wherry housing projects under Section 807 of Title VIII of the National Housing Act as amended (12 U. S. C. 1748f). They also outlined areas of legal and administrative action which might be successfully used to reduce or eliminate taxes from these projects. Some measure of success was achieved under the original legislation. However, with the release of reference (d), many projects hitherto accepted by the FHA and the local taxing authorities as not being subject to local taxation were promptly placed on the tax rolls. In several cases, the resulting high taxes precipitated rent increases to meet mortgagee and FHA tax escrow demands of such magnitude as to threaten mass move-outs from the projects and imminent financial failures followed by subsequent foreclosures. To provide relief from this situation reference (a) was enacted.

4. Delegation of Authority. Pursuant to the authority delegated to the Chief of the Bureau of Yards and Docks by enclosure (1), authority is hereby delegated to the District Public Works Officers to execute tax deduction determinations for all Navy and Marine Corps Wherry projects located within their respective Districts. In exercising the authority hereby delegated, the District Public Works Officers shall coordinate their actions

with the Commanding Officer of the Navy or Marine Corps activity primarily or exclusively served by the housing project under consideration. The authority above delegated to the District Public Works Officers shall not be further redelegated.

5. Functions and Responsibilities.

a. The District Public Works Officers shall proceed promptly to take the actions required by enclosure (1) for all Wherry housing projects in their respective areas of jurisdiction for which taxes or assessments are made or may be made on the leasehold interest of the lessees. This Instruction does not apply to those few Wherry projects where the sponsors hold fee simple title thereto. These projects are located at: Lakehurst, N.J., Green Cove Springs, Fla., one Section of the Cherry Point, N.C. project; Kearney Mesa, San Diego, Calif., and Moffett Field, Calif.

b. The District Public Works Officers shall assemble all necessary technical data, participate in negotiations with project sponsors and public officials, and perform such other functions as may be required for them to determine the appropriate deductions from taxes or assessments on Wherry projects, and in ascertaining the comparability of the taxes or assessments with respect to such projects to the taxes on other similar properties of similar value.

c. The Office of General Counsel representative on the staff of the District Public Works Officer shall provide legal services and advice relating to

any legal questions that may arise in the implementation of this Instruction.

d. The services of Bureau personnel and of the Office of General Counsel will be available for assistance as deemed necessary or appropriate by the District Public Works Officer, but the responsibility for making the final determination remains with the DPWO.

6. Procedures.

a. The DPWO Counsel will study local and state tax laws to satisfy himself that the project sponsor's leasehold interest is or is not legally subject to local taxation.

b. The Counsel's report to the DPWO will serve as the basis for the DPWO to either (1) advise the sponsor that his leasehold is not subject to taxation and therefore if taxes are paid they should be paid without prejudice to the sponsor's legal recourse to recover from the taxing authority; or (2) proceed with a tax deduction determination.

c. Where a project is found to be taxable, thus requiring a determination, the DPWO will draw from the following sources of information in assembling tax deduction data for his analysis and determination:

(1). Navy construction cost records of PL 155/82nd Congress funds used to assist in construction of the project.

(2). Navy records of operating costs of fire and police protection service (payroll, equipment M&O,

capital investment in equipment and buildings, etc.) provided by the Navy.

(3). Project sponsor's construction cost records on street and utilities installations.

(4). Project sponsor's annual M&O records on any of above facilities installations, as well as services rendered to the tenants.

(5). FHA records.

(6). Local community's budget operations for schools, streets, police and fire protection, etc.

(7). Local assessor's records.

(8). Department of Health, Education and Welfare payment reports, which will be furnished the DPWO by this Bureau in accordance with an agreement between the Department of Defense and the Department of Health, Education and Welfare. Any questions regarding the amounts reported by the Bureau should be referred to the Bureau for inquiry and discussion with HEW. Under no circumstances should figures covering school deduction items which might be volunteered by local HEW representatives or local school authorities be used in developing a formal Navy determination, since this Bureau has been advised by the Director of the Division of School Assistance, HEW, that only those figures furnished over his signature will be recognized and defended by that Department in the event the Navy's determination is contested.

d. Where possible, the DPWO will work closely with the local public officials and the project sponsor in preparing the list of items to establish (1) the appropriateness of including them as deductions,

and (2) the reasonableness of the amounts computed for each item. Consideration of these items is treated in detail later in paragraph 9 of this Instruction. The DPWO shall confer with the Commanding Officer of the Navy or Marine Corps activity involved in the case at hand before making his determination. He shall also keep the District Commandant concerned currently informed of the actions he is taking in connection with each tax deduction determination.

e. When the DPWO has obtained all of the facts available to him, he will carefully weigh them in arriving at the dollar amount deemed "appropriate" under the language of references (a), (b), and (c). He will then:

(1). Execute the formal Determination (enclosure (3)), and forward it to the project sponsor by letter patterned after enclosure (4).

(2). Forward signed copies of the Determination to the local taxing authority, the mortgagee, and the cognizant FHA Field Director, by transmittal letters patterned after enclosures (5), (6), and (7) respectively.

(3). Forward to the Director of the Mortgage Insurance Division, Federal Housing Administration, Washington 25, D. C. a copy of the letter to the local FHA, with a copy of the determination.

(4). Forward information copies of all of the above letters (with copy of determination) to:

(a). District Commandant concerned.

(b). Commanding Officer of activity concerned.

(c). Management Bureau or Office of naval activity concerned (or ComMarCorps in the case of a Marine Corps activity).

(d). Addressees of original letters listed in 6, c, (2) above, (without copy of determination).

(5). Prepare in quintuplicate a complete analytical report, including use of enclosure (8), and forward with copies of enclosures (3) through (7) to Chief, Bureau of Yards and Docks within 15 days of execution and distribution of a tax deduction Determination. This is necessary in order for this Bureau to comply with paragraph 6 of enclosure (1). The above report from the DPWO should also include documentary evidence of acceptance of the DPWO's determination, by the town, city, or county governing body where such agreement has been reached. In cases where the validity of the determination is challenged, either informally or by a legal action, (see paragraph 6 of enclosure (1)), a full statement should be made of this fact, whereupon this Bureau will determine what course of action should be pursued to overcome the objections.

(6). Maintain a close follow-up with all the addresses receiving the determination in order to accomplish the original purpose of the above action, namely, to reduce project rents to reflect the reduction or elimination of taxes from the sponsor's operating costs by reason of the Determination. In this connection, attention is directed to enclosure (2) which is the Federal Housing Administration's statement of policy and procedure addressed to its

Field Directors. Mortgagors and mortgagees should both be urged to make early, and if necessary, continuing requests to FHA for that agency to recognize the Navy Department's formal tax deduction determination, thereby giving proper effect to reference (a). The Navy will not concur with FHA in any recommendation for a rent increase necessitated by its failure to recognize the Navy's determination of a tax deduction pursuant to reference (a), notwithstanding the FHA's policy as stated in the sixth paragraph of enclosure (2).

(7). The DPWO will not have accomplished the objectives set forth in references (a), (b), and (c), and enclosure (1), and in this Instruction until he has succeeded in having rent reductions actually put into effect which reflect full recognition of this Determination. As stated previously, the Bureau is prepared to assist the DPWO to the maximum extent possible to accomplish this objective.

7. Discussion of Factors to Be Considered in Arriving at a Determination.

a. Taxibility of a Wherry sponsor's leasehold interest. The primary question involved here is: Is the sponsor's leasehold interest properly subject to taxation under the tax laws of the State within whose boundaries the project is located? The question of Congressional consent to such taxation has now been effectively removed from consideration by reason of (1) the U. S. Supreme Court's decision in reference (d), and (2) the passage by Congress

of reference (a). Nevertheless, it is still true that (1) the sponsor owns a leasehold interest in the project, while the United States has title to the land and improvements comprising the project, and that (2) in order to tax the sponsor's leasehold interest it is a prerequisite that a State have a tax law which taxes leasehold interests generally. The Nebraska statute upon which the Offutt Housing case turned was Nebraska Reissue (1950) Rev. Stats. of 1943, s. 77-1209, which provides in part, "all improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease * * * The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner * * *" Accordingly, the Supreme Court ruled that, under Nebraska law, the sponsor's leasehold is subject to tax and added: "In the circumstances of this case then, the full value of the buildings and improvements is attributable to the lessee's interest." However, in support of the statement above that there must be (as a prerequisite to taxation by a local authority) a State tax law in existence (as of the local assessment date) which reaches this type of leasehold, there is a decision by the Supreme Court of the Commonwealth of Massachusetts made on 11, February, 1957, (subsequent to the date of reference (d), (Squantum Gardens Inc., and another vs. Assessors of Quincy and another 140 N.E. 2nd. 482). wherein the Court held that under existing Massachusetts law a Wherry sponsor's leasehold interest in a project located in that State is not sub-

ject to local taxation. Two pertinent extracts are here quoted from the above Massachusetts decision, which have general applicability to the problem. They would be no less effective if read within the context of the decision.

(1) "Compliance with the Congressional permission thus has two aspects. It means both (1) that the State tax statute must authorize a tax of the character permitted by the Congress, and (2) that the administrative action of assessment and collection must comply with the Congressional and State statutory authorization.

(2). "* * * we are guided by the well recognized principle of statutory construction that 'tax laws are to be strictly construed. The right to tax must be plainly conferred by the statute. It is not to be implied. Doubts are resolved in favor of the taxpayer.' "

The Bureau's experience in dealing with local assessors and other public officials has revealed repeatedly that they have not been accurately apprised of the facts concerning a Wherry leasehold, and that when they were, in many cases the projects were removed entirely from the tax rolls, the local officials agreeing that their State tax laws were inoperative in such instances. Hence, the importance of a careful study of the local and state tax laws by DPWO Counsel, which may include discussions with local and State Attorneys and Tax Commissioners. It should not be assumed that because the project has been taxed in past years, it has been legally as-

sessed and therefore should continue on the tax rolls uncontested.

c. Comparability Study. Where it has been established that the leasehold is legally taxable, the following studies should be made. Since reference (a) provides in part that: "* * * no [state or local taxes or assessments] on this interest of [a lessee of a Wherry housing project from the Federal Government] shall exceed the amount of taxes or assesments on other similar property of similar value * * *" (emphasis added), it should be determined by a staff study of the assessment roll and a field check that the assessed value of this leasehold interest is comparable to other properties within the same taxing jurisdiction, and that the proper tax rate is being applied. This may also involve a comparative study of the statutory ratio to the actual assessment ratio in use. In many cases it may be found that the actual ratio falls well below the allowed statutory limit, in which case it should be ascertained that the assessor is using the same ratio on the Wherry project as he applies to other properties. Regarding the tax rate, in general, this is fixed by local ordinance and is not subject to modification. Once a property value is determined, the application of the legal tax rate determines the amount of (gross) taxes.

9. Deductions

a. Classification of Permissible Deductible Items.

Reference (a) states: "That no such taxes or assessments * * * shall exceed the amount of taxes or

assessments * * *, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal, or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property:" (Emphasis added.) Deductions should be made in connection with the types of items listed below if provided by (1) direct Federal payment to the local community to support its local public service programs, or by (2) expenditures by the Federal Government or the lessee to furnish facilities and services directly to the project tenants; provided such facilities or services are normally supplied through general taxation. It is probable, however, that in most taxing jurisdictions many of the items listed below (such as streets, sidewalks, and playgrounds or similiar facilities supplied on the development site) would be supplied by special assesment or would be paid for by the owner. In such cases, no deduction should be made for these items. The two types of items are as follows:

(1). Capital Expenditures, including schools, hospitals and clinics, libraries, streets and roads, street lighting equipment, sewage systems, mains, and facilities, water mains and facilities, fire protec-

tion facilities, hydrants, stations and equipment, sidewalks, curbs and gutters, public buildings, trash and garbage disposal plants, snow removal equipment, and parks and playgrounds.

(2). Annual expenditures for costs of operating and maintaining above items and for any other tax-supported services (irrigation, pest control etc.).

b. Limitations on Deductions.

With respect to "any payments made by the Federal Government * * *," this language is so inflexible as to preclude any latitude of interpretation. Any and all payments under this category (with respect to the project) are deductible without adjustments. However, in the case of expenditures by the Government or lessee, there is room to exercise discretion in determining the amounts "which may be appropriate" as deductible. The general rule to observe is, that payments or expenditures for which a deduction is contemplated must bear a direct relation to the project in order to comply with the language of the statute: "* * * with respect to such property," and "* * * services or facilities * * * customarily provided * * * with respect to such other similar property."

c. Measurement of Deductions.

In the case of a Federal (HEW) payment reported for school construction the DPWO should ascertain what the local community's school bonding practice is, that is, the repayment period of the bonds and the interest rate thereon. The amount of the Federal payment should then be amortized, in-

cluding interest on the unpaid principal, at a level annual amount. The period of amortization on other capital improvement items should be based on (1) local bonding practices—if the item is so financed by the community, or (2) the remaining mortgage period of the project, or (3) the remaining useful life of the item, or (4) a single full lump sum deduction if the item is customarily an annual line-item in the local community's budget. The choice of which one of the above methods to use is left to the DPWO.

In the case of operating and maintenance items, the full amount of annual Federal payment to the local community is deductible without adjustment as was explained above. For operating and maintenance expenditures by the Government or the lessee, reference (c) states that these amounts "may be computed as the actual cost or the portion of the local government's budget attributable to such services." The amount of the deduction should either equal the actual cost of the service or facility furnished, or should bear the same ratio to the total tax imposed as the taxing authority's budgeted item for the same service or facility bears to its total budget, whichever is the lesser. The reasons for the method selected should be explained in the DPWO's report to the Bureau.

10. Action required of the Sponsor

In consonance with the objective stated in paragraphs 6e(6) and 6e(7) above, the DPWO should urge the sponsor to (1) promptly furnish evidence to the FHA of his demand on the local taxing au-

thority to reduce taxes in recognition of the Military's determination, and (2) pursue a vigorous follow-up with his mortgagee and the FHA to have the tax escrow requirement reduced, thus leading to a corresponding adjustment in the project rents.

11. Periods covered by, and Frequency of, Determinations

These determinations must be made for every tax year. Care should be exercised in developing the initial determination, both as to the method of arriving at the appropriate dollar amount and in relating the deductions to a specific twelve-month period which either coincides with the local tax year or is correlated as nearly as possible to it. In most taxing jurisdictions the tax year coincides with the calendar year. The period to be covered for those items under the category of expenditures made by the Federal Government or the sponsor should cover the last previous tax year. Where the sponsor's fiscal year or the Federal fiscal year does not coincide with the local tax year, it will be necessary to adjust to the local tax year. Whatever periods are used in the initial calculations leading to the first determination must be used in each succeeding year in order to avoid possible overlaps or gaps in the periods for which the tax deduction determination is being computed.

/s/ R. H. MEADE,
Rear Admiral, CEC, USN,
Chief of Bureau

Distribution:
SNDL N2 (less 10, 15, 17, APWO MAR, APWO ELM)

Copy to:
OASD (P&I) (6 copies)
SNDL A1, A5, A6, F2 (less 10, 15, & 17)
Budocks List X5

Bureau of Yards and Docks—Enclosure (1)

Department of the Navy
Office of the Secretary
Washington 25, D. C.

BUDOCKINST 11011.42—12 July, 1957.
SECNAV 11101.29
BUDOCKS C-540A/etj
3 Jun., 1957.

SECNAV Instruction 11101.29
From: Secretary of the Navy.
To: Distribution List.

Subj.: Determination of Amounts of Deductions From Taxes on Wherry Family Housing Projects.

Ref.: (a) Section 408 of Title IV of the Housing Amendments of 1955, as amended by Public Law 1020, 84th Congress (70 Stat. 1091).

Encl.: (1) DOD Directive 4165.30 of 16 Nov., 1956.
(2) DOD Instruction 4165.32 of 27 Dec., 1956.

1. Purpose. The purpose of this Instruction is to:

a. State the policy of the Department of the Navy with respect to implementing reference (a) pursuant to the policies and instructions set forth by the Department of Defense in enclosures (1) and (2) governing the determination of appropriate deductions from taxes or assessments on the interests of lessees of Wherry housing projects.

b. Delegate authority and assign responsibility within the Department of the Navy for making such determinations.

c. Implement the policies and procedures contained in enclosures (1) and (2).

2. Background. Reference (a) provides that: "* * * no (state or local taxes or assessments) on the interest of (a lessee of a Wherry housing project from the Federal Government) shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property * * *" Since the above refers specifically and exclusively to Wherry lessees'

interests, those few projects in the Navy's Wherry program owned in fee simple title by the Wherry sponsors rather than by the Federal Government, are not affected by this Instruction.

3. Policy. It is the policy of the Department of the Navy:

a. To take full advantage of the deductions authorized by reference (a) in order to hold to the minimum the amounts that must be collected in rents from the occupants of Wherry projects for payment of taxes.

b. To assist the lessees of Wherry projects in appropriate actions to obtain acceptance by local taxing authorities, mortgagees, and the Federal Housing Administration of the deductions as determined by the Department of the Navy in accordance with reference (a).

c. In determining the amounts which may be appropriately deducted from taxes or assessments on Wherry projects, to co-operate with taxing authorities and other public agencies, and to render all possible assistance to them.

4. Delegation of Authority. The authority vested in the Secretary of the Navy by enclosure (1) is hereby redelegated to the Chief of the Bureau of Yards and Docks or his designee for all Navy and Marine Corps Wherry housing projects. In exercising the authority hereby delegated, the Chief of the Bureau of Yards and Docks or his designee shall co-ordinate with the Commanding Officer of the Navy or Marine Corps activity primarily or

exclusively served by the housing project under consideration before making the required determinations, and shall keep the District Commandant concerned currently informed of the actions taken.

5. Action:

a. The Chief of the Bureau of Yards and Docks shall issue such further instructions as may be necessary to implement reference (a) in detail, and shall exercise co-ordination control within the Department of the Navy with respect to administering and executing the provisions of reference (a).

b. The Chief of the Bureau of Yards and Docks, or his designee, shall take the actions required under Section IV of enclosure (2) for all Wherry housing projects serving exclusively or primarily Navy and Marine Corps activities, for which taxes or assessments are made on the interests of lessees.

6. Reports required. The Chief of the Bureau of Yards and Docks shall prepare the reports required under Section V of enclosure (2) for transmittal by the Assistant Secretary of the Navy (Material) to the Assistant Secretary of Defense (Properties and Installations) and the Secretaries of the other military departments as required. If the validity of the determination is challenged, or if it is anticipated that it shall be challenged, or if it is not accorded full force and effect, this information should be included in the report, or a supplemental report should be forwarded promptly in accordance with Section 5 of enclosure (2). Copies of these reports shall be furnished to the Chief of the Man-

agement Bureau concerned (or Commandant of the Marine Corps as appropriate), the Commandant of the Naval District, and to the Commanding Officer of the activity primarily or exclusively served by the project.

/s/ F. A. BANTZ,
Assistant Secretary of the
Navy (Material).

Distribution:
SNDL:A3, A5 (BUDOCKS only), A6.

Copies to:

OASD (P & I) (6 copies).
A1, A2A (less OSB, NPR), A4, A5 (less Bu-Docks).

[Seal]

November 16, 1956.

Number 4165 30

Department of Defense Directive

Subject: Taxes on Wherry Housing Projects.

Reference: (a) Section 511, Public Law 1020, 84th Congress (70 Stat. 1110).

Pursuant to the authority vested in the Secretary of Defense by Section 202(f) of the National Security Act of 1947, as amended, and Section 5 of the Reorganization Plan No. 6 of 1953, the authority conferred on the Secretary of Defense by reference (a) is hereby delegated as set forth below.

The Assistant Secretary of Defense (Properties and Installations) is delegated the authority to:

1. Issue instructions for the guidance of the military departments in making determinations under reference (a) as to the amounts which may appropriately be deducted from the taxes or assessments on Wherry projects.

2. Enter into agreement with the head of any executive department or agency of the Federal Government for the furnishing of information regarding the amount of any payments or other contributions made to local taxing or other public agencies with respect to Wherry projects or for establishing procedures to facilitate implementation of reference (a).

3. Perform such functions under reference (a) as are not otherwise delegated to the Secretaries of the military departments.

The Secretary of each military department, or his designee, is hereby delegated the authority to:

1. Determine the amounts which may appropriately be deducted under reference (a) from taxes or assessments on Wherry projects.

2. Assist the lessees of Wherry projects in furnishing information regarding appropriate deductions to local taxing authorities for the purpose of fixing the net amount of taxes to be paid on Wherry projects.

/s/ C. E. WILSON,
Secretary of Defense.

Lodged October 14, 1957.

[Title of District Court and Cause.]

United States District Court, Southern District of California, Central Division

MINUTES OF THE COURT

Date: October 22, 1957.
At: Los Angeles, Calif.
Present: Hon. Wm. C. Byrne, District Judge.
Deputy Clerk: Charles E. Jones.
Reporter: None.
Counsel for Plaintiff: No appearance.
Counsel for Defendant: No appearance.
Proceedings: On Court's own motion.

It Is Ordered that plaintiff's application for a preliminary injunction is Denied.

It Is Further Ordered that the Order to Show Cause is discharged and the temporary restraining order is dissolved.

It Is Further Ordered that defendants' motion is granted and the action is dismissed.

It Is Further Ordered that counsel for defendant is directed to prepare, serve and lodge findings and conclusions pursuant to Rule 52, FRCP, covering the refusal of the preliminary injunction and an Order of Dismissal covering the motion to dismiss all in accordance with local Rule 7.

Counsel notified.

JOHN A. CHILDRESS,
Clerk;

By,
Deputy Clerk.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER DENYING PRELIMINARY INJUNCTION

The Court finds as follows:

Findings of Fact

I.

This is a proceeding by a California corporation to enjoin, suspend and restrain the collection of taxes by the County of San Bernardino through its officers under the law of California, and for a declaratory judgment that said taxes are not due or owing to said County by plaintiff.

II.

That plaintiff has a plain, speedy and efficient remedy in the courts of the State of California.

Conclusions of Law

Because of plaintiff's plain, speedy and efficient remedy in the courts of the State of California, and the proscription of 28 U.S.C. 1341, this court may not grant plaintiff the injunctive relief it seeks in this action.

Order

In accordance with the foregoing findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed:

1. That application for preliminary injunction on file herein be denied;

2. That the temporary restraining order, previously issued herein, be and the same is hereby dissolved.

Dated: November 7th, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed and entered November 7, 1957.

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

Defendants' motion to dismiss upon the ground that plaintiff has not stated a claim upon which relief can be granted having come on for hearing before this court on the 17th day of October, 1957, and

It appearing to the court that this is an action to enjoin, suspend and restrain the collection of a state tax, and that a plain, speedy and efficient remedy is available to the plaintiff in the state courts, and

It further appearing that by reason of the provisions of 28 U.S.C. 1341, this court cannot grant the plaintiff relief on its claim to enjoin, suspend and restrain the collection of state taxes, where a plain, speedy and efficient remedy is available in the state courts,

Now, Therefore, It Is Hereby Ordered that the action be and it is hereby dismissed.

It Is Further Ordered that this dismissal shall not operate as an adjudication on the merits.

November 7th, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed and entered November 7, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harsh California Corporation, a California corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order dismissing the action entered in this action on November 7, 1957.

HOLBROOK, TARR &
O'NEILL,
/s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Appellants, Harsh California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harsh California Corporation, a California corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order denying preliminary injunction entered in this action on November 7, 1957.

HOLBROOK, TARR &
O'NEILL,
/s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Appellants, Harsh California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

MOTION AND ORDER TO EXTEND THE TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

Plaintiff respectfully requests the Court, pursuant to Rule 73(g) of the Rules of Civil Procedure, to extend the time for filing the record on appeal and docketing the appeal to ninety days from the date of filing the first notice of appeal on March 3, 1958.

Dated December 26, 1957.

HOLBROOK, TARR &
O'NEILL,

By /s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Harsh California Corporation.

Order

Good cause appearing therefor and pursuant to Rule 73(g) of the Rules of Civil Procedure, the time for filing the record on appeal and docketing the appeal is extended to ninety days from the date of filing the first notice of apeal on March 3, 1958.

Dated: December 26, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

Affidavit of Service by Mail attached.
[Endorsed]: Filed December 27, 1957.

United States Court of Appeals
for the Ninth Circuit

No. 1034-57-WB

HARSH CALIFORNIA CORPORATION, California Corporation,

Plaintiff,

vs.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic, et al.,

Defendants.

MOTION AND ORDER EXTENDING THE TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

Plaintiff respectfully requests the Court to extend the time for filing the records on appeal and docketing the appeals to sixty (60) days from March 3, 1958, the date on which said docketing and filing is now due.

The orders dismissing the above action and denying a preliminary injunction were entered on November 7, 1957. Notices of appeal therefrom were filed on December 4, 1957.

On December 26, 1957, a motion to extend the time for filing the records on appeal and docketing the appeals, pursuant to Rule 73(g) of the Federal Rules of Procedure, was filed in the United States District Court, Southern District of California, Central Division, and an order extending said time for

fifty (50) days was signed by the Honorable Judge William Byrne on the same date. The fifty-day extension expires on March 3, 1958.

No other motion for extension of time has been presented to any Judge of the Ninth Circuit.

Plaintiff requests this extension because, at the present time, an action by the defendant, County of San Bernardino, against plaintiff herein, involving the same matter, is before the Superior Court of the State of California. It is very possible that the State action will resolve the questions raised in this appeal. In such event, the time of the Court, as well as counsel for both sides, would be well saved by granting this motion.

Dated: February 13, 1958.

HOLBROOK, TARR &
O'NEILL,
By /s/ FRANCIS H. O'NEILL,
Attorneys for Plaintiff.

Counsel for defendants in the above-entitled action have no objection to the granting of the order requested above.

ALBERT E. WELLER,
County Counsel;

By /s/ J. B. LAWRENCE,
Deputy County Counsel.

Order

Good cause appearing therefor, the time for filing the records on appeal and docketing the appeals in the above-entitled action is extended sixty (60) days from March 3, 1958.

Dated: 2-14-58.

/s/ STANLEY W. BARNES,
United States Circuit Court Judge.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 145, inclusive, containing the original:

Complaint for Declaratory Relief, Injunction and Restraining Order.

Order to Show Cause.

Temporary Restraining Order.

Motion to Dismiss.

Plaintiff's Points and Authorities in Opposition to Defendant's Motion to Dismiss.

Defendant's Reply in Support of Motion to Dismiss.

Plaintiff's Supplemental Points and Authorities in Opposition to Defendants' Motion to Dismiss.

(Photocopy) Documents Lodged With the Court 10/14/57.

Plaintiff's Points and Authorities on Court Directed Question of Federal Jurisdiction.

Defendant's Points and Authorities on Lack of Jurisdiction.

Findings of Fact, Conclusions of Law and Order Denying Preliminary Injunction.

Order Dismissing Action.

Notice of Appeal From Order Dismissing Action.

Notice of Appeal From Order Denying Preliminary Injunction.

Motion and Order Extending Time for Filing Record and Docketing Appeal, filed 12/27/57.

Motion and Order Extending Time for Filing Record and Docketing Appeal, dated 2/13/58.

Designation of Record on Appeal.

Appellees' Supplemental Designation of Record on Appeal.

B. Minute Order of 10/14/57 re Hearing Motion to Dismiss Complaint.

Minute Order of 10/22/57 re Denial of Plaintiff's Application for Preliminary Injunction, etc.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: April 21, 1958.

JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15991. United States Court of Appeals for the Ninth Circuit. Harsh California Corporation, a Corporation, Appellant, vs. County of San Bernardino, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15991

HARSH CALIFORNIA CORPORATION, a California Corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic; S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as Members of and Constituting the Board of Su-

pervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellee.

APPELLANT'S STATEMENT OF POINTS RELIED UPON ON APPEAL, PURSUANT TO RULE 75 OF FEDERAL RULES OF CIVIL PROCEDURE

Comes Now the Appellant, Harsh California Corporation, a California corporation, pursuant to Rule 75 of the Federal Rules of Civil Procedure and states that it intends to rely on the following points in the Appeal of the above-entitled case:

1. The District Court erred in denying Appellant's application for declaratory relief, to wit:

That the credit, offset and deductions in the sum of $27,759, as demanded, pursuant to Section 408 of the National Housing Act of 1955, as amended, by the designee of the Secretary of Defense, to have been expended by the United States of America with respect to such property is a valid and complete credit, offset and deduction from 1957-58 taxes claimed by the defendant, County of San Bernardino, to be owing to it from plaintiff on account of plaintiff's "possessory interest and all other right, title and interest" arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States of America; that the entire demanded amount of said 1957-58 taxes claimed by defendant, County of San Ber-

nardino, from Appellants is the sum of $21,388; and that therefore there is no sum at all due, owing or unpaid to defendant County from Appellants on account of said 1957-58 taxes.

2. The District Court erred in denying Appellant's application for injunction restraining defendants, their agents, servants, employees and all persons, in active consort and participating with them, from doing any and all acts to enforce the said tax or any penalty thereon against Appellants.

3. The District Court erred in denying Appellant's application for a Temporary Restraining Order, pending final hearing and determination of this cause on its merits, restricting defendants and each and all of them from doing any and all acts to enforce and collect the alleged tax on Appellant's "possessory interest and all other right, title and interest" in the aforesaid lease from the United States of America.

4. The District Court erred in finding and holding the Appellants had a plain, speedy and efficient remedy in the courts of California as there was no relief in said courts of the State of California available to Appellants for the following reasons:

a. There is no provision in the Constitution or laws of the State of California for allowance of a credit, offset or deduction of sums of money paid by the United States of America to the State of California, or its subordinate entities from or against amounts claimed by the State of California or its subordinate entities by way of ad valorem

taxes; and there is no procedure provided by cancellation, in part or whole, of any ad valorem taxes previously levied, by virtue of payment made by the United States of America which is provided under the laws of the United States of America to be a credit, offset or deduction against said ad valorem taxes.

b. That the Constitution and laws of the State of California provides no relief in this type of situation involving said ad valorem taxes as the only Declaratory Relief Act of said State (Cal. C.C.P., Sec. 1060) is restricted to cases involving deeds, wills, written instruments, or under contracts or which involve the location of a natural channel of a water course, and it has been expressly held in California that there is no "contractual" right involved in an ad valorem tax matter.

c. That the Constitution and laws of the State of California do not provide any remedy or method for the refund of taxes collected by way of payment under protest of the said tax and suit thereafter to recover the same pursuant to California Revenue & Taxation Code, Sections 5136-5143, unless the assessment is claimed to be void; that the assessment here is not claimed to be void; but an offset under Federal law by virtue of a payment in excess of the taxes levied under the valid assessment, is the sole basis of the claim sought to be raised here.

d. That under the Constitution and laws of the State of California there is no Statutory remedy for refund of taxes here sought to be collected under the provisions of the "refund" sections of the Cali-

fornia Revenue & Taxation Code, Sections 5096-5107, which are restricted to a situation where the taxes "refunded" are erroneously or illegally collected and it is admitted here that the assessment and tax were legally levied and, therefore, under California law, its collection would not be illegal or erroneous.

e. That under California Constitution and laws there is no Statutory remedy pursuant to California Revenue & Taxation Code, Sections 4986-4994, available to a taxpayer to compel, prior to payment, cancellation of the whole, or any portion of an assessment, by reason of the fact that the herein assessment is not claimed to be erroneous or illegal and further by reason of the fact that the Supreme Court of California has determined and held that the remedy provided in said sections of the Revenue & Taxation Code is not enforceable in a court of law by a citizen or taxpayer.

f. That the common law remedies of Mandamus, Certiorari and Injunction are not available in the Courts of the State of California to a taxpayer protesting or otherwise claiming that the taxes levied against his property are improper, erroneous or illegal by virtue of decision of the California Supreme Court which held that such remedy is not available in a matter involving taxes.

5. That the District Court erred in concluding that 28 U.S.C. 1341 prohibited the District Court from granting Appellant the relief it sought and in concluding that 28 U.S.C. 1341 was applicable to the situation here involved, as there was no plain,

speedy and efficient remedy in law or fact available to Appellant in the courts of the State of California.

Dated: This 30th day of April, 1958.

HOLBROOK, TARR &
O'NEILL,

By /s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Plaintiff-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1958.

No. 15991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRIS CALIFORNIA CORPORATION, a California corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MITCHELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLANT.

HOLBROOK, TARR & O'NEILL,
W. STEPHEN HOLBROOK,
FRANCIS H. O'NEILL,
438 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellant.

FILED
JUL 10 1958
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Opinion below 1

Jurisdiction 1

Statutes involved 3

Questions presented 3

Statement of points to be urged 4

Statement of facts 5

Summary of argument 7

I.

District Court clearly has jurisdiction of instant action, as one for declaratory judgment under 28 U. S. C. 2201, since it arose under federal statute, granting offset to state tax, and no attempt was made to enjoin collection of a state tax, but to enforce federal offset against the same 10

A. This action clearly "arises under . . . laws . . . of the United States" 11

B. No administrative provision for effectual federal "deduction" or offset exists under state or federal statute 14

C. Under California cases, to assert judicially an offset against a valid tax, in absence of express statutory provision, would be to sue the state without its consent 15

D. District Court misunderstood nature of suit before it, and therefore erred in dismissing same under misconception that its jurisdiction was prohibited by Johnson Act 16

E. "Uncertainty" of any relief in state courts demonstrated as to this very tax in action taken by State Superior Court, when county sought to enforce the same by suit 19

PAGE

II.

California statute and case law provide no plain, speedy and efficient remedy 20

A. Declaratory relief does not lie on facts of this case in the California courts 20

B. Cancellation of tax even though improper, can not be enforced by private party under California statute..... 22

C. On facts of this case, appellant had no right of payment under protest followed by suit for recovery..... 23

D. California tax refund claim procedure, followed by tax recovery suit, not available to appellant..... 24

E. Extraordinary remedies of mandate, certiorari or injunction, are not available to appellant in the state courts on facts of this case..... 29

III.

On facts here, propriety of relief sought is clear under the Supreme Court decision in Hillsborough Township v. Cromwell.. 31

Conclusion 32

Appendix:

A. Pertinent federal statutes.....App. p. 1

B. Pertinent California statutes.....App. p. 4

TABLE OF AUTHORITIES CITED

CASES	PAGE
All-American Aircraft v. Village of Cedarhurst, 201 F. 2d 273	13
Amy v. Shelvy County Tax District, 114 U. S. 387	14
Carterville Water Works Co. v. Mayor, etc., Cartersville, 16 S. E. 70	14
City of Dallas v. Higgenbotham-Bailey-Logan Co., 37 F. 2d 513	13
Easton v. County of Alameda, 9 Cal. 2d 301	28
Evans v. County of San Joaquin, 67 Cal. App. 2d 452	27
First National Bank of Canton v. Williams, 252 U. S. 504	12
Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293	18
Hammond-Knowlton v. Hartford, Conn., Trust Co., 89 F. 2d 175	24, 25
Hillsborough Township v. Cromwell, 326 U. S. 620	16, 18, 31
Himmelman v. Spanagle, 39 Cal. 389	14
Hoyt v. Board of Civil Service Commissioners, 21 Cal. 2d 399	21
Kelshaw v. Superior Court, 137 Cal. App. 181	26
King County, Washington v. Seattle School District No. 1, 263 U. S. 261	11
McVeigh v. Lanier, 8 S. W. 141	14
Morgan v. Pueblo & Arkansas Valley Rd. Co., 6 Colo. 478	14
People v. Superior Court, 161 A. C. A. 48	21
Peyton v. Railway Express Agency, 316 U. S. 350, 62 S. Ct. 1171	12
Prescott v. McNamara, 73 Cal. 236	14
Roles v. Earle, 195 F. 2d 346	25
Security-First National Bank v. Supervisors, 35 Cal. 2d 323	23
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441	31
State v. Newton, 300 P. 2d 527	25
Sunset Oil Co. v. State of California, 87 F. 2d 972	15, 30
Western Town Lot Co. v. Lane, 7 S. D. 599, 65 N. W. 17	14
Whittaker v. County of Tuolumne, 96 Cal. 100	21

RULES

PAGE

Federal Rules of Civil Procedure, Rule 12(6) 7

STATUTES

California Constitution, Art. XIII, Sec. 9a 22
Code of Civil Procedure, Sec. 1050 21
Code of Civil Procedure, Sec. 1060 20, 21
Code of Civil Procedure, Sec. 1068 29
Code of Civil Procedure, Sec. 1085 29
National Housing Act, Sec. 408 2, 5, 6, 7, 14, 32
National Housing Act, Sec. 603 5, 7
Public Law 1020, 84th Cong., 2d Sess. (70 Stat. 1110) 2
Revenue and Taxation Code, Sec. 2501 14
Revenue and Taxation Code, Sec. 2502 14
Revenue and Taxation Code, Sec. 2511 14
Revenue and Taxation Code, Secs. 4986-4994 22
Revenue and Taxation Code, Secs. 5096-5097 24, 28
Revenue and Taxation Code, Sec. 5098 28
Revenue and Taxation Code, Secs. 5136-5143 23
Revenue and Taxation Code, Secs. 5138-5142 23
United States Code, Title 12, Sec. 1706(b) 5
United States Code, Title 12, Sec. 1748 5
United States Code, Title 28, Sec. 1291 3
United States Code, Title 28, Sec. 1292 3
United States Code, Title 28, Sec. 1313 11
United States Code, Title 28, Sec. 1331 2, 32
United States Code, Title 28, Sec. 1341 3, 4, 7, 11, 17, 18
United States Code, Title 28, Sec. 2201 2, 6, 16, 28, 33
United States Code, Title 28, Sec. 2202 28, 33
United States Constitution, Fourteenth Amendment 31

TEXTBOOK

1 Cooley on Taxation, p. 90, fn. 17 14

No. 15991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARSH CALIFORNIA CORPORATION, a California corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

Opinion Below.

The District Court filed no written opinion. Its Findings of Fact and Conclusions of Law [R. 71-72] are not reported.

Jurisdiction.

This is an action by Harsh Corporation, a California corporation, brought on August 29, 1957, in the United States District Court for the Southern District of California, Central Division [R. 3-25], pursuant to Title 28

U. S. C. Section 2201, to secure a declaratory judgment against the County of San Bernardino, California, the five individual members of the Board of Supervisors of said County, its County Auditor, Tax Collector and County Counsel, that property taxes assessed and levied against said corporation with respect to its "possessory interest", as lessee of Government owned land and improvements, by said County and its officers, in the amount of $21,388 for the fiscal year 1957-58, had been properly offset by proper determination by the authorized designee of the Secretary of Defense of the United States of America, acting pursuant to the provisions of Section 408 of the National Housing Act as amended by Public Law 1020, 84th Congress, Second Session, 70 Stat. 1110 [R. 21-23].[1]

The District Court had jurisdiction of this action under 28 U. S. C. Sections 1331 and 2201. The defendants moved to dismiss [R. 3031], upon the ground that the complaint failed to state a claim upon which relief could

[1]Such provision reads in full as follows:

"Nothing contained in the provisions of Title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of Title VIII: *Provided,* that no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property."

be granted, in that the Court could not grant the ancillary injunctive relief, also prayed for, by reason of inhibition of Title 28 U. S. C. Section 1341. The cause was submitted upon the pleadings, exhibits thereto, and arguments of the parties, written and oral.

On November 7, 1957, the District Court filed its Findings of Fact and Conclusions of Law, and Order Denying Preliminary Injunction, and Order Dismissing Action [R. 71-73]. Within sixty days, and on December 4, 1957, Appellant filed Notice of Appeal from the orders [R. 73].

Jurisdiction is conferred on this Court by Title 28 U. S. C. Sections 1291 and 1292.

Statutes Involved.

The pertinent statutes are printed in the Appendix, *infra.*

Questions Presented.

1. Whether the District Court erred in determining that the plaintiff had a plain, speedy and efficient remedy available in any of the courts of California, and thus was precluded by Title 28 U. S. C. Section 1341 from securing a declaratory judgment that a Federal statute had effected a valid offset against a valid state tax.

2. Whether the District Court erred in denying Appellant a preliminary injunction, preventing the County from collecting from the Appellant a valid tax which, by intervening Federal law, had been legally offset, pending final determination of the nature and extent of such Federal offset.

3. Whether the finding of fact that plaintiff had a plain, speedy and efficient remedy in the courts of the State of California is clearly erroneous, and is wholly unsupported by any evidence before the District Court.

Statement of Points to Be Urged.

On this appeal, Appellant urges and relies upon all of the points originally stated and set out by it [R. 81-85], as the points upon which it intends to rely. For present purposes, they may be briefly stated as follows:

(1) The District Court erred in dismissing Appellant's suit for determination under the Declaratory Judgment Act, of its rights under the Federally determined "deduction" from the California property tax on its "possessory interest" in lesser amount, but validly levied thereon under State statute, except for such "deduction";

(2) The District Court erred in concluding Title 28 U. S. C., Section 1341, prohibited the District Court in granting Appellant the relief sought, and in concluding that Title 28 U. S. C. Section 1341 was applicable to the situation here;

(3) The District Court erred in finding and holding that Appellant had a plain, speedy and efficient remedy in the courts of California as, in fact, there is no remedy available to Appellant under the laws of said State for the enforcement of its rights under said Federally declared and determined "deduction" from a valid California property tax;

(4) The District Court erred in denying Appellant's application for injunction, restraining Appellee County, its agents, officers and employees, from doing any and all acts to enforce the said California property tax or penalty against Appellant, pending determination of the Declaratory Judgment Act rights of Appellant and said County under the aforesaid Federal "deduction";

(5) The District Court erred in denying Appellant's application for permanent injunction, restraining Appellee

County, its agents, officers and employees in doing any and all acts to enforce the said California property tax or penalty against Appellant, to the extent such tax was finally determined by judgment of said Court to be equal to or less than the amount of the aforesaid Federal "deduction", when judicially determined to have been validly made.

Statement of Facts.

Since the District Court acted wholly on Appellee's motion to dismiss, without taking any evidence, all facts set forth in the complaint [R. 3-25] are admitted on this appeal. Summarized these are:

Appellant is lessee of tax-exempt land and improvements owned by the United States, located at Barstow Marine Corps Supply Center, Barstow, California, which constitutes a military housing project for officers, enlisted men and necessary civilian personnel. Both lease and construction of such buildings had been made pursuant to the provisions of the Wherry Act (12 U. S. C. 1748 *et seq.*).

Appellant concedes that, under California law, its leasehold interest in such Government property was taxable as a "possessory interest" since the United States by Section 603 of the National Housing Act (12 U. S. C. 1706b) had expressly consented to levy of state and local taxes thereon.

But, prior to the levy of the taxes here in question, Section 408 of the same Act had been amended by Congress to provide for a *"deduction"*, credit, or offset to such *consented* state or local taxes in

> *"such amount as the Secretary of Defense,* or his designee, *determined to be equal to any payments*

made by the Federal Government to any local taxing or other public agency involved with respect to such property. . . ."

Appellee County assessed Appellant's "possessory interest" for 1957-58 in the amount of $427,760. Taxes thereon were levied against it in the sum of $21,388.

On August 1, 1957, Appellee Tax Collector demanded payment of such amount on or before August 31, under threat of seizure and sale of the government lease, if not paid, and in any event, for an additional 8% penalty ($1,711.04) if not so paid.

Pursuant to the 1956 amendment of the National Housing Act (Sec. 408) Captain A. D. Hunter, as designee of the Secretary of Defense, on August 9, 1957, determined that there was a "deduction", offset, or credit against such tax on account of subsidy payments made by the Federal Government to the Appellee County in the total amount of $27,759 [Ex. C, R. 23] and since such "deduction" exceeded the amount of the tax there was no sum owing at all to the County.

This determination was transmitted to its Board of Supervisors on August 13 [Ex. C, R. 21]. On August 15, Appellant made separate demand upon the Board of Supervisors to comply with Captain Hunter's determination and to cancel its claimed tax liability [Ex. D, R. 24]. However, the County and its officers have at all times refused to cancel such tax liability or to give any effect whatsoever to Captain Hunter's determination as to the appropriate "deduction" therefrom.

Appellant filed this suit for Declaratory Judgment as to its rights in the premises on August 29, 1957. As permitted under 28 U. S. C., Sec. 2201, it sought ancillary

injunctive relief against the County and its officers pending such declaratory judgment and subsequently for enforcement of such judgment.

On October 4, 1957, Appellees, pursuant to Rule (12) (6) of the Federal Rules of Civil Procedure, moved to dismiss this action for lack of jurisdiction in the District Court. The Honorable William Byrne, Judge of the District Court, granted such motion on November 7, 1957. On the same day he entered his findings of fact and conclusions of law [R. 71][2] as well as his judgment dismissing this action [R. 71-72].

On December 4, 1957, Appellant appealed to this court from said judgment of dismissal and the whole thereof [R. 74].

Summary of Argument.

Under California law, Appellant's leasehold was taxable as a "possessory interest", since the United States, by Section 603 of the National Housing Act, had expressly consented to levy of state and local taxes on its lessee's interest.

Prior to the levy of 1957-58 taxes, Section 408 of the National Housing Act had been amended to provide for a "deduction" from such local taxes in "such amount as the Secretary of Defense, or his designee, determined to be equal to any payments made by the Federal Government to any local taxing or other public agency involved with respect to such property. . . ."

Appellee County levied taxes against Appellant in the amount of $21,388.00. Appellee Tax Collector, on August

[2]As indicated by the Conclusions of Law entered by the District Court [R. 71] its dismissal was wholly predicated upon the claimed limitation on exercise of basic jurisdiction of the District Court by 28 U. S. C. A. §1341 (Johnson Act).

1, 1957, demanded payment of this amount on or before August 31, 1957, under threat of seizure and sale of the Government lease and, in any event payment of a penalty of $1,711.04 if taxes were not paid prior to that date.

Pursuant to the aforesaid Federal statute, Captain A. D. Hunter, U.S.N., designee of the Secretary of Defense, on August 9, 1957, determined that there was a "deduction" on account of subsidy payments made by the Government to the County of $27,759.00 and since said "deduction" exceeded the amount of the tax, there was no sum owing to the County.

Captain Hunter's determination was transmitted to the County Board of Supervisors on August 13, 1957. On August 15, 1957, Appellant made separate demand upon the Board to comply.

No California statute authorizes any offset to be made against a valid County tax. The Federal statute provides no administrative implementation. By state statute, the Tax Collector is required to receive the tax in lawful money of the United States only, together with an 8% penalty, amounting to $1,711.04, if the tax was not so paid before August 31, 1957.

The Tax Collector is empowered by state law, on non-payment of a tax to enforce the same by seizure and sale of Appellant's leasehold estate, or by suit for recovery of judgment for the amount of the tax, penalties and costs, against Appellant.

The California statutes do not include any general consent provision for suit against the state, or its subordinate entities, including counties. Consent statutes are specific in character, and do not permit the setting up of an offset to a state tax.

The State Declaratory Relief Act is a remedial statute limited to where direct suit is permitted. It affords no remedy to Appellant here.

The State Tax Protest Statute, permits suit for recovery of taxes only when the tax is "void", in whole or in part. There is no claim here that the tax is void.

The State Tax Refund Statute permits suit only if the tax is "illegally" collected. Since the duty imposed on the Tax Collector is to collect the entire amount of the valid tax, here admitted, were Appellant to pay the tax, this procedure would not be available.

Mandamus is unavailable in the State Courts because there is no duty upon the Tax Collector, under state law, to give effect to the Federal deduction. Certiorari or Writ of Review is not available, because no action of a judicial character by an inferior tribunal is involved.

Injunction is not available in California to the wronged taxpayer. Further, it is not available to Appellant because, until the Federal offset has been determined, there is no basis for an injunction under state law against the valid collection of a valid state tax. There is no provision for the determination of the supervening Federally authorized deduction, since to set the same up in absence of state consent thereto, is to sue the sovereign without its consent.

The only remedy, therefore, available to Appellant is to secure in the District Court, determination of the validity of the Federal deduction and, predicated upon such declaratory judgment, restrain, in the Federal Court, any attempt to collect the state tax, offset by such Federal deduction.

I.

District Court Clearly Has Jurisdiction of Instant Action, as One for Declaratory Judgment Under 28 U. S. C. 2201, Since It Arose Under Federal Statute, Granting Offset to State Tax, and No Attempt Was Made to Enjoin Collection of a State Tax, but to Enforce Federal Offset Against the Same.

Plaintiff does not now, and never has, claimed any *invalidity per se* in the tax levied on its "possessory interest". Its non-liability for payment of such tax does not arise out of *illegality* or *error* in such tax, but is the result of a countervailing "deduction", offset, or credit first created by Congress by the 1956 amendment of the National Housing Act, quoted in full, footnote 1 (*supra* p. 2).

The purpose of this offset, as clearly stated in the House Committee Report[3] thereon, was to prevent "windfall profits" accruing to local entities by reason of receiving *both* a congressional subsidy *and* local taxes from the leasehold interest in the Government property in question.

[3]The House Committee Report stated the purpose for the "deduction" as follows:

> "As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, *it is important* that *no payments be made to communities which would constitute a windfall over and above normal taxes.* Consequently, it is very important to assure that the project does *not duplicate* payments for services furnished to it. *This duplication would be avoided under the provision in the bill for deductions* from tax payments, as explained above."

A. This Action Clearly "Arises Under . . . Laws . . . of the United States."

Basic jurisdiction here, as a case arising "under the . . . laws . . . of the United States" (28 U. S. C. 1313) is clearly established. Apparently this was recognized by the District Court.[4]

In *King County, Washington v. Seattle School District, No. 1,* 263 U. S. 261 (1923), the Supreme Court had before it a Federal statute, providing that certain moneys derived from use of national forest reserves in the State of Washington were to be paid, as a subsidy, to that State to be used for "public roads" and "public schools", "and not otherwise". By state statute, the Federal subsidy funds had been distributed in such manner that the school district in question did not receive one-half. The school district brought an action in the District Court against the County Commissioners of King County for an accounting to it of amounts sufficient to make up one-half of the subsidy.

On the point of *jurisdiction* the Supreme Court said at pages 363-4:

> "Section 24 of the Judicial Code provides that the district courts shall have original jurisdiction where the matter in controversy arises under the laws of the United States. *In this case the right and title set up by the appellee depends upon the act of Congress.* There is involved the question whether that

[4]Reference to the District Courts Conclusion [R. 71] discloses that it rested its decision *solely* on the claimed prohibition in 28 U. S. C. 1341.

act permits the money so received by the county to be expended by the county commissioners as directed by state legislation, or requires an equal distribution annually for the benefit of public schools and public roads of the county. . . . *The District Court had jurisdiction.*" (Our italics.)

In *Peyton v. Railway Express Agency,* 316 U. S. 350, 62 S. Ct. 1171 (1942), an action was commenced against the Express Agency for $750,000 damage occasioned by loss of property sent by express. Objection to jurisdiction was interposed upon the ground that by limitation in the carrier's contract, its liability was $50, below jurisdictional requirement. For lack of the jurisdictional amount, the District Court dismissed. The Supreme Court held the liability itself involved an interpretation of the Federal "Carmack Amendment", therefore, the District Court had jurisdiction, saying at page 353:

". . . Petitioner's pleading, which we have summarized, satisfied this requirement *since it adequately discloses a present controversy, dependent for its outcome upon the construction of a Federal Statute.*" (Our italics.)

In *First National Bank of Canton v. Williams,* 252 U. S. 504 (1920), the bill alleged that Williams, Comptroller of Currency, had maliciously persecuted plaintiff bank. The Supreme Court said at page 512:

"What constitutes a cause arising *'under'* the laws of the United States has been often pointed out by this court. *One does so arise where an appropriate statement by the plaintiff,* unaided by any anticipation or avoidance of defenses, *discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an*

act of Congress. . . . Clearly, the plaintiff's bill discloses a case wherein its right to recover turns on the construction and application of the National Banking Law; . . ." (Our italics.)

In *All-American Aircraft v. Village of Cedarhurst,* 201 F. 2d 273 (C. C. A. 2d, 1953), the District Court had restrained enforcement of a city ordinance as conflicting with Federal legislation regulating aircraft. Appeal was taken upon the ground that the ordinance was a valid exercise of State police power and, therefore, the District Court lacked jurisdiction. The Circuit Court of Appeals said at page 277:

"*. . . there can be no doubt,* as none is suggested, *of the meaning of the ordinance and its direct clash with the Federal regulations as interpreted by plaintiffs. There is therefore no occasion for postponement here for possible state action. The general authority of the court below is clear under 28 U. S. C. A. Secs. 1331 and 1337.*" (Our italics.)

In *City of Dallas v. Higgenbotham-Bailey-Logan Co.,* 37 F. 2d 513 (C. C. A. 5th, 1930), plaintiff sought injunction against the city from enforcing personal property taxes. The assessor had learned, after plaintiff had returned its property for assessment purposes, that it owned two million dollars in Liberty Bonds and Treasury Notes. He assessed the same as cash, contending that the purchase had been for the purpose of evading local taxes. The Circuit Court of Appeals stated the objections urged to jurisdiction, *which it rejected,* at page 514:

"The city excepted to the bill on the ground that there was no Federal question involved, . . .

"As to the first of these propositions, it is sufficient to say that, *if the plaintiff had acquired the*

securities in such manner as to be free from taxation, and what was being done by the city amounted to an attempt to tax them by this indirect method, the same amounted to a clear violation of the law . . . and the lower court, therefore, had jurisdiction to construe and apply this Federal statute, under section 24(1) of the Judicial Code." (Our italics.)

B. No Administrative Provision for Effectual Federal "Deduction" or Offset Exists Under State or Federal Statute.

No provision for giving administrative effect to the federally created "deduction", or offset, is contained in Section 408 of the National Housing Act as amended (*supra,* p. 2, f. 1) or elsewhere by Federal statute. By state statute (Cal. Rev. & T. C., Secs. 2501, 2502), county taxes must be paid only "in legal tender or in money receivable in payment of taxes by the United States" unless the Board of Supervisors by a four-fifths vote authorizes use of county warrants of the same fiscal year (Cal. Rev. & T. C. Sec. 2511).

There is thus no *express* statute implementing the Federal "deduction" or offset here.

It has long been the law of California that, in a tax proceeding, there is no right of offset or counter-claim against an otherwise valid State Tax, *"unless expressly so authorized by statute".*[5]

[5]*Himmelman v. Spanagle,* 39 Cal. 389, 393 (1870);
Prescott v. McNamara, 73 Cal. 236 (1887).
To same effect in other states see:
Cooley on Taxation, Vol. 1, p. 90, F. N. 17;
Western Town Lot Co. v. Lane, 7 S. D. 599, 65 N. W. 17;
McVeigh v. Lanier, 8 S. W. 141 (Ark. 1888);
Morgan v. Pueblo & Arkansas Valley Rd. Co., 6 Colo. 478 (1883);
Carterville Water Works Co. v. Mayor, etc. Cartersville, 16 S. E. 70 (Ga. 1892);
Amy v. Shelvy County Tax District, 114 U. S. 387 (1885).

C. Under California Cases, to Assert Judicially an Offset Against a Valid Tax, in Absence of Express Statutory Provision, Would Be to Sue the State Without Its Consent.

Furthermore, under California law, the right to raise *judicially* by counter claims or cross-complaint an offset to a valid tax is itself a suit against the Sovereign. This, under California cases, may *not* be done unless *expressly* authorized by a consent statute. *There is no California consent statute applicable here.*

This was squarely held by this Court on similar facts in *Sunset Oil Co. v. State of California,* 87 F. 2d 972 (1937). This Court said at pages 974-75:

> "The Supreme Court of California in People v. Miles, 56 Cal. 401, stated the general rule with reference to the allowance of set-off against the state, as follows: 'It would seem to be hardly necessary to cite authorities to the proposition, that a *State cannot be sued in her own State, directly or indirectly, as by setting up a counter-claim or set-off;* nor can any judgment be recovered against the State, *except when the same is permitted by express statute'.*
>
> "The first question for consideration is whether or not the state has authorized a suit to be brought against it to recover a tax *illegally* and *erroneously collected. The burden lies upon the parties suing the state to show that such a suit has been authorized by the state.* The appellant points to section 3669, subd. 3, of the Political Code, . . . *This section* does not purport to authorize a suit against the state to recover taxes erroneously or illegally collected, but *provides an administrative method for securing a set-off.* . . . The rule is that *authority to sue must be expressly given. It is therefore not to be inferred from a mere recognition of substantive right to be established by administrative procedure that authority has been given to sue.* . . .

> "It follows from what has been said, that the *state has not authorized a suit to recover* for taxes *erroneously or illegally collected* by its *officers otherwise than by the action of its administrative officers.*" (Our italics.)

For this reason, therefore, the action below was brought in the District Court to secure a declaratory judgment under the provisions of 28 U. S. C. 2201, as to the rights of the Appellant and the Appellees, arising out of the Federal offset statute in question. That such remedy includes *all* taxes, other than "Federal taxes", was held and applied by the United States Supreme Court in *Hillsborough Township v. Cromwell,* 326 U. S. 620, 622-8 (1946).[6]

D. District Court Misunderstood Nature of Suit Before It, and Therefore Erred in Dismissing Same Under Misconception That Its Jurisdiction Was Prohibited by Johnson Act.

The District Court's Findings of Fact and Conclusions of Law [R. 71-72] disclose, we submit, an entire misunderstanding by the District Court, both as to the nature of the suit before it and of its jurisdiction in connection therewith.

The findings[7] describe this proceeding as one "to enjoin, suspend and restrain the collection of taxes" by the

[6]In this case the Court sustained a decision by the District Court in a declaratory judgment proceeding holding that a New Jersey property assessment for the years 1940 and 1941 was "null and void", and holding that federal jurisdiction so to do existed because of the "uncertainty surrounding the adequacy of the state remedy."

[7]Thus, paragraph I of the Findings of Fact reads as follows:

> "This is a proceeding by a California corporation to enjoin, suspend and restrain the collection of taxes by the County of San Bernardino, through its officers, under the laws of California, and for a declaratory judgment that said taxes are not due or owing to said County by plaintiff."

defendant county, *and* for "a declaratory judgment that said taxes are not due or owing to said county by plaintiff".

That, the District Court *erroneously* considered the *ancillary* relief sought, to be the *gist* of the action, appears clearly by reference to the first prayer of the complaint [R. 14-15][8] which asked the court for declaratory judgment that the "deduction" in the sum of $27,759, as made by Captain Hunter, was a "valid and complete offset and deduction".

With due respect to the District Judge, it seems clear that he *confused* the declaratory judgment proceeding, so instituted, with the more common action brought to restrain the "levy or collection" of a state tax on grounds going to its *basic invalidity* under Federal statute or Constitution.

Of course, basic jurisdiction of the District Court in cases of the latter category is limited by the Johnson Act (28 U. S. C. 1341) to situations where the plaintiff did *not* have "a *plain, speedy* and *efficient* remedy" in the *state* courts. That the District Court *erroneously*

[8]So far as pertinent here, the first and basic prayer of the complaint reads as follows:

> *"That this Court declare that the offset and deduction in the sum of $27,759.00, as determined,* pursuant to Section 408 of the National Housing Act of 1955, as amended, *by the designee of the Secretary of Defense* to have been expended by the United States of America with respect to such property *is a valid and complete offset and deduction from 1957-58 taxes* claimed by defendant County to be owing to it from plaintiff *in the sum of $21,388.00* on account of plaintiff's 'possessory interest and all other right, title and interest' arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States, *and that, therefore, there is no sum at all due, owing or unpaid to defendant County* from plaintiff on account of said 1957-58 taxes." (Our italics.)

construed the instant action as one to *enjoin* state taxes also appears from its second finding, which recites that appellant had "a plain, speedy and efficient remedy in the State of California", and from its conclusion based thereon, which categorically predicated its dismissal of this proceeding *"because of . . . the prescription of 28 U. S. C. 1341.*[9]

As a matter of fact, Section 1341 is *not* applicable *directly* to a proceeding brought for declaratory judgment. This was held by the Supreme Court in *Hillsborough Township v. Cromwell,* 326 U. S. 620 (1946), in pointing that the Federal Courts—*only as a matter of "policy"*—, have used the same as a yardstick in exercising their jurisdiction under the declaratory judgment act.

See also:

Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 300-301 (1943).

But jurisdiction is established here, in any event, as held by the Supreme Court in the *Hillsborough Case, supra, if there is "uncertainty surrounding the adequacy of the state remedy".*

[9]In its entirety, the conclusions of law, as rendered by the District Court, read as follows:

"Because of plaintiff's plain, speedy and efficient remedy in the Counts (*Sic.*) of the State of California and the prescription of 28 U. S. C. 1341, this court may not grant plaintiff the injunctive relief it seeks in this matter."

E. "Uncertainty" of Any Relief in State Courts Demonstrated as to This Very Tax in Action Taken by State Superior Court, When County Sought to Enforce the Same by Suit.

Before considering specific cases showing "uncertainty" as to any relief being available to Appellant in the State Courts, we wish to point out two basic considerations:

(1) It was never claimed by Appellee that there was any case precedent in California demonstrating existence of State remedy for Appellant under the specific circumstances of this case.

(2) Since this suit was instituted in the District Court, Appellee County sued Appellant in the California Courts for the recovery of the entire tax here in question *without any consideration of the Federally determined "deduction" therefrom.* The United States, acting through its Department of Justice and local United States Attorney, sought to intervene and set up the Federal "deduction", offset or credit. Likewise Appellant attempted, by cross-complaint, to secure injunctive relief against enforcement of the tax based on its right thereto under the Federal "deduction" alleged in the Government complaint in intervention.

On motion of Appellee, the Superior Court of California in and for the County of San Bernardino denied the Government *any right of intervention* and *struck* Appellant's *cross-complaint for injunction, without leave to amend.*

The United States is now prosecuting an appeal therefrom in the State courts. By agreement between the parties, no further action will be taken by the County thereon, pending the determination of the Federal right of intervention by the state appellate court.

II.

California Statute and Case Law Provide No Plain, Speedy and Efficient Remedy.

In attacking the judgment of dismissal below, *without any express authority in support thereof,* it is evident that for us affirmatively to show either "uncertainty" in the State remedy, or absence of State remedy, requires longer consideration than otherwise would be the case. It is always more difficult to prove the negative than the positive.

Turning therefore to a general survey of California statutory provisions which might possibly, but actually do not, afford a remedy available to Appellant under the circumstances of this case, we believe that there are only four applicable remedies which could conceivably have existed in California, to wit:

a. Declaratory relief in the State Courts;

b. Payment of the tax without consideration of the offset, under protest, and suit for recovery thereof;

c. Payment of the claimed tax, without deduction of offset, filing of claim for refund thereof, and suit against the County on denial of the claim;

d. Relief in some manner by *mandamus, certiorari* or *injunction.*

A. Declaratory Relief Does Not Lie on Facts of This Case in the California Courts.

The only authority in California for institution of declaratory relief action in the state courts is found in the Code of Civil Procedure, Section 1060 reading so far as pertinent as follows:

> "Any person interested under a *deed, will* or other *written instrument,* or under a *contract,* or who desires a *declaration of his rights* or duties with respect

> to another, or in respect to, in, over or upon *property*, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the permises, including a determination of any question of construction or validity arising under such instrument or contract." (Our italics.)

It is evident that the remedy in California is thus limited to construction of a *"deed", a "will," "written instrument", "contract",* or *"property" rights* particularly in connection with a "water course".

While it is true that the word "person" has been held to include a political subdivision, California courts have held that Section 1060 is *remedial* only. Relief thereunder *cannot* be granted if an "impairment of sovereign powers would exist".

> *Hoyt v. Board of Civil Service Commissioners,* 21 Cal. 2d 399, 402 (1942);
>
> *People v. Superior Court,* 161 A. C. A. 48, 51 (1958).

For similar holding under Code of Civil Procedure, Section 1050, authorizing an action to determine "an adverse claim", see,

> *Whittaker v. County of Tuolumne,* 96 Cal. 100, 101 (1892).

When as here, the only purpose for seeking declaratory relief under the state statute would be to set up the validity of an offset to an admittedly valid state tax, in the absence of express statutory provision to sue the state therein, it is clear that the state declaratory relief procedure would not be available.

B. Cancellation of Tax Even Though Improper, Can Not Be Enforced by Private Party Under California Statute.

The *only* provision authorizing the cancellation of a property tax proceeding, once begun, is found in Revenue and Taxation Code, sections 4986-4994. So far as pertinent here the basic section 4986 reads as follows:

> "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled . . . if it was levied or charged:
>
> a. More than once.
>
> b. Erroneously or illegally.
>
> c. On a portion of an assessment in excess of the cash value of the property by reason of the assessor's clerical error.
>
> d. On improvements when the improvements did not exist on the lien date."

Only one of the four grounds is even remotely applicable, to wit: "erroneously or illegally". In this case, there is no question that the assessment made by the County Assessor *as* of the first Monday of March, 1957, was *not erroneous* or *illegal.* As an unsecured assessment, the tax rate was fixed by the California Constitution (Art. XIII, Sec. 9a) at the *secured* property rate of the preceding year in the same taxing districts.

Both the assessment and *amount of* tax had, therefore, become *final* under state law, and the tax was *due* and *payable, before* Captain Hunter, acting as designee of the Secretary of Defense, *made* his determination on August 9, 1957, as to an offset, credit, or "deduction" in an amount *exceeding the entire tax.* On the face of the statute, cancellation was not authorized here by *administrative* means.

Moreover, since the decision of the California Superior Court in *Security First National Bank v. Supervisors,* 35 Cal. 2d 323, 327 (1950), it has been held that the remedy under these sections *can not be enforced in the courts by a private taxpayer by mandate to compel a cancellation, even if one were authorized by the statute.*

The California statute and case law is thus *devoid* of any remedy, *administrative* or *judicial,* authorizing *correction* of the tax proceedings here in order to give effect to the Federally created offset, credit, or "deduction".

C. On Facts of This Case, Appellant Had No Right of Payment Under Protest Followed by Suit for Recovery.

A very common procedure followed as to property taxes in California, as in other states, is to pay the same under protest, coupled with immediate suit for recovery of the protested taxes. Procedure in this regard is contained in Revenue and Taxation Code sections 5136-5143. Unlike the cancellation provisions, if the subject matter falls *within* the permitted protest, consent for suit is given (Secs. 5138-5142). But, under this statutory procedure, the protest and suit are limited to an "assessment" which is *"void* in whole or in part".

Assuming that the word "assessment" is broad enough to include a "tax", it is evident here, since *both* the "assessment", in its technical meaning and the "tax" were assessed or levied respectively (and as to the "tax" due and payable) *prior* to Captain Hunter's determination, *it can hardly be argued that it was "void" in whole or part.*

D. California Tax Refund Claim Procedure, Followed by Tax Recovery Suit, Not Available to Appellant.

The remaining statutory remedy to which Appellant *might,* but does not have recourse, is by paying the tax voluntarily, filing a verified claim for refund within three years after payment, and if such be denied, bring suit for its recovery (R. & T. C. 5096-5097).

The basic section (5096) sets forth the only grounds upon which such a refund may be made by the Board of Supervisors (or on failure, compelled by subsequent suit) is as follows:

(a) "Paid more than once"

(b) "Erroneously or illegally collected"

(c) "Paid on an assessment in excess of the cash value of the property, by reason of the assessor's clerical error"

(d) "Paid on the assessment of the improvements, when the improvements did not exist on the lien date."

The second is the *only* ground even remotely available to Appellant. The question therefore arises, would the collection *now* of the tax from Appellant be *"erroneous* or *illegal"* under the above statute?

It is evident here that had Appellant paid the tax *prior* to Captain Hunter's determination, its collection could not have been either "erroneous or illegal" *since the Federal offset did not come into existence until Captain Hunter's determination had been made.*

Thus, in *Hammond-Knowlton v. Hartford, Conn. Trust Co.,* 89 F. 2d 175 (C. C. A. 2d, 1932), the Court said at pages 177-178:

> "This section therefore refers to the crediting of a Federal tax *illegally collected, not to the crediting*

ON *a federal tax of a payment made or to be made to a state.*

"The credit for state taxes claimed in the return could *not* be allowed by the Commissioner *until payment thereof was made and the requisite proof submitted to him. . . . At that time, the Appellee had not submitted the documents and evidence required by the regulation.*" (Capitals indicate emphasis by court; italics ours.)

In *Roles v. Earle,* 195 F. 2d 346 (1942), this Court expressly relied upon the *Hammond-Knowlton Case* on similar facts.

Even more apt is *State v. Newton,* 300 P. 2d 527 (Colo. 1956). The Federal Estate Tax on the Estate of Newton, a Colorado resident, basically was $19,529.21, against which there was applicable credit up to 80% on account of inheritance taxes, if paid to other states. Payments made to several states totaled $6,092.18 less than such maximum.

In order to take advantage of such situations, the Colorado Legislature had adopted a so-called "gap tax", which levied on each Colorado estate an additional amount "equal to the difference between the maximum 80% credit . . . and the total credit applicable . . . for actual state death taxes thus paid". Newton's Estate thereupon paid to the State of Colorado, on account of the "gap tax", the sum of $6,092.18.

Subsequently, Congress retroactively adopted an amendment which, as applicable to Newton's estate, reduced its Federal tax liability and the ordinary state taxes, excluding the "gap tax", were sufficient in amount to use up the 80% maximum credit.

Alleging these facts, the administratrix filed her claim with the State of Colorado, alleging that the "gap tax" had been "erroneously paid" and sought its recovery. The trial court gave judgment for plaintiff, ordering refund as prayed.

On appeal, the Colorado Supreme Court reversed the judgment, saying at pages 529-30:

> "Was the voluntary payment of a 'gap tax' to the State of Colorado, after receipt of notice to pay same from the state, such an erroneous payment of the tax, under the facts herein presented and under applicable Colorado statutes, as to permit or require a refund or recovery upon proper claim?
>
> "This question is answered in the negative. Colorado has no statute which expressly permits such a refund. . . . The fact that plaintiff here did not pay until notified to do so, or paid by mistake, or by what proved to have been a mistake, or paid under a factual misrepresentation, makes no difference. Said Sec. 43 reads in part: 'When any amount of said tax HAS BEEN PAID ERRONEOUSLY * * *, it shall be lawful * * * 'to refund it'. (Emphasis added.) *Clearly, Newton's tax was not 'paid erroneously' at the time it was paid.*" (Capitals indicate italics by court; italics ours.)

As to the construction of the word "erroneous", the California Supreme Court in *Kelshaw v. Superior Court,* 137 Cal. App. 181-192 (1934), came to the same conclusion, saying:

> *"Since upon the face of the record it appears that the amount of inheritance tax was the exact amount provided for in the order fixing the amount of tax to be paid, the conclusion necessarily follows that*

> *there could have been no amount 'erroneously paid'* within the meaning of said subdivision." (Our italics.)

Would then the statutory procedure be available to Appellant *now,* if it should *after* Captain Hunter's determination, pay the tax voluntarily, file a claim and sue for its recovery?

Under the cases, we submit that Appellant can *not* recover under such statute, even when payment is made *after* the determination of the offset.

There can be no question, as noted, that if Appellant were *now* to pay the tax in full to the tax collector of Appellee County, it could not subsequently claim that its collection was *"erroneous".* But what would be the situation as to a refund as *"illegally"* collected taxes *at this time?*

To constitute an "illegal" collection, it is not necessary for the tax, itself, to be illegal. Thus, where a Tax Collector demands from A, payment of a valid tax of B's, in order to release A's property from a lien for B's tax, the tax is "illegally" *collected* from A and refundable to him (*Evans v. County of San Joaquin,* 67 Cal. App. 2d 452, 455-6 [1945]).

However, in this case, not only is the tax itself *valid, but the Tax Collector, under California law, is under a duty to collect the same.* While it is true that the "deduction" or offset authorized by paramount Federal statute is in a larger amount, as we have already seen, there is no *administrative* or judicial mode provided by *state* statute by which such "deduction" may be established and the duties of the Tax Collector changed accordingly.

On the other hand, if, as Appellant contends it should do, the Federal District Court declares Captain Hunter's determination as to the Federal deduction to be valid and subsisting, and the Tax Collector thereafter attempts to collect the valid tax against Appellant, despite the larger Federal offset, Appellant would be entitled, under the provisions of Title 28, U. S. C. Sections 2201 and 2202, to appropriate injunction, restraining him from attempting so to do.

The Tax Refund Statute of the state does not, therefore, furnish any adequate relief on the facts of this case.

But perhaps equally important is the underlying principle in the California cases that *the ground of "error" or "illegality" must be one running to the person claiming the refund or bringing the suit.* In this case, existence of the *federal "deduction" is not occasioned by any act of Appellant. It flows from the subsidies* previously made to Appellee County *by the United States.*

Such situation has never been contemplated in California as one affording the basis for refund of either an "illegal" or "erroneous" tax. The intent of the California Refund Statute (R. & T. C. 5096-5097) is clearly set forth in Sec. 5098 as follows:

> "If any action is brought under this Article by *any other person than the person who paid the tax,* his guardian, executor or administrator, *judgment shall not be rendered for the plaintiff."* (Our italics.)

Illustrative of this well established California policy is *Easton v. County of Alameda,* 9 Cal. 2d 301 (1937), in which the court said at pages 303-4:

> *"These changes show a legislative intention to allow tax refunds only to those persons who pay the taxes*

claimed to have been erroneously assessed. The statute operates to benefit 'all persons who pay taxes they are not legally bound to pay'. . . . but does not allow a recovery by a property owner whose taxes have been paid by someone else under a contract to do so. *In that case, the property owner has parted with nothing and he has no valid claim for a refund."* (Our italics.)

E. Extraordinary Remedies of Mandate, Certiorari or Injunction, Are Not Available to Appellant in the State Courts on Facts of This Case.

It is fundamental that in California, certiorari only lies to determine the exercise of jurisdiction of an inferior tribunal "exercising judicial functions" (Cal. C. C. P. 1068). *Certiorari could not be available to Appellant herein, simply because there are no "judicial functions" involved.*

While broader in scope, *mandate* by California statute (Cal. C. C. P. 1085) is granted only to compel performance of "an act which the law specifically enjoins as a duty resulting from an *office, trust,* or *station."* As already pointed out, no California statute enjoins upon anyone a duty to give effect to the Federal "deduction", credit or offset here involved. Neither does the Federal act itself purport so to do.

Originally, the matter might seem to have been of more doubt as to the use of *injunction.* It is a primarily negative remedy, not an affirmative one, as is the case with mandate. Injunction does *not* lie in California to restrain collection of a *state* tax, basically for the same reasons that it does not in the Federal courts, to wit: existence of a believed adequate remedy by statutory protest or tax refund claim procedure, previously discussed.

However, under the facts of this case, there are two definite and clear reasons why such remedy does *not* lie in the state courts.

First, there is no mode provided for establishing in a state court proceeding, the existence of the Federal "deduction", credit or offset to the otherwise valid statute. As was held by this court in *Sunset Oil Co. v. State of California* (*supra,* p. 15), so to do would be, in effect, an action to sue the state without its consent.

Secondly, if there were still any doubt on the subject, Appellee is now *estopped* from raising the same in this litigation. When it sued Appellant in the state courts for the full amount of its claimed tax, without consideration in any regard of the Federal determined "deduction" therefrom, *on Appellee's motion, the state court struck Appellant's attempted use of injunctive relief, without leave to amend, on the ground that such remedy was not open to Appellant in the state courts.*

Having thus urged on the state court its lack of jurisdiction to enjoin collection of the tax, here in question, based solely on the Federal offsetting "deduction" thereto, Appellee County certainly cannot now urge on this court that such remedy does exist in the state court, and that, therefore, there is no jurisdiction in the District Court below.

III.

On Facts Here, Propriety of Relief Sought Is Clear Under the Supreme Court Decision in Hillsborough Township v. Cromwell.

In essence, the controlling decision here, as previously indicated, is *Hillsborough Township v. Cromwell,* 326 U. S. 620 (1946). In that case, a unanimous Supreme Court held that the District Court had *correctly* taken jurisdiction of the suit before it under the Declaratory Judgment Act.

The contention had been made by Mrs. Cromwell that assessment of her intangible personal property, *in strict accordance with the New Jersey law,* was, nevertheless, *void* under the Fourteenth Amendment, *because the Township had not assessed any other property of the same class.* As the United States Supreme Court, for many years, had held (*Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-7) the Fourteenth Amendment guarantees the taxpayer "the right to equal treatment" in the assessment and levy of state property taxes.

However, the New Jersey courts refused to recognize and apply this "Sioux City Bridge Rule". For this reason, Mrs. Cromwell, being without state remedy in New Jersey, had sought exercise of Federal jurisdiction under the Declaratory Judgment Act. The Township argued, however, that in 1933, the New Jersey courts had expressly altered their view, and had adopted the Sioux City Bridge Rule. They claimed, therefore, the taxpayer had an adequate remedy in the state courts.

The District Court, holding to the contrary, took jurisdiction and found the New Jersey *assessment to, and tax on,* Mrs. Cromwell to be *"null* and *void",* although it was able to do so on *separate* grounds of violation of *state* statute.

In affirming such exercise of jurisdiction, the United States Supreme Court, discussed the New Jersey decision claimed to have adopted the Sioux City Bridge Rule, pointing out that there was a question as to its applicability in the case before it. It continued at page 625:

> "In any event, *there is such uncertainty concerning the New Jersey remedy as to make it speculative* (*Wallace v. Hines,* 253 U. S. 66, 68; 40 S. Ct. 435, 436; 64 L. Ed. 782) whether the State afford full protection to the federal rights. . . . *Accordingly we conclude that there was such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause."* (Our italics.)

Conclusion.

It is clear from the foregoing that the District Court below had Federal jurisdiction over this proceeding as a case arising "under the laws of the United States", Title 28 U. S. C., section 1331. The Federal "law" is, of course, the Federal "deduction" from a State tax provided by the 1956 Amendment to Section 408 of the National Housing Act.

Whether Appellant is also entitled, in enforcement of such Federal "deduction" to the remedy granted, under the Federal Declaratory Judgment Act, in view of the "policy" of the Federal courts in this regard, depends

solely upon whether it is "certain" that Appellant has available to it, in the California courts, an *equally plain, speedy* and *efficient* remedy for enforcement of its rights under such Federal statute.

On this second question, the District Court Judge seems to have been confused, both as to the nature of the suit before him, and what constitutes a showing of *"certainty"* as to an available state remedy or remedies.

The judgment of dismissal was frankly rendered without citation to the court of any claim of precedent directly applicable to Appellant's situation here. If, as the Supreme Court has said, *there is reasonable "uncertainty" as to "adequacy of the state remedy" here, then there is shown the need for interposition by the Federal court* through *declaration* of the rights of the parties and *enforcement* thereof, when such have been determined.

Under the Cromwell and similar cases, the suit here was properly instituted under the Declaratory Judgment Act. On a record showing no *clear* remedy available to it in the state courts, judgment of dismissal entered below was erroneous and should be reversed.

We, therefore, submit that this proceeding should be remanded to the District Court, with leave to Appellees to file such answer, or such other pleadings, which they may desire, and thereafter, for the District Court to determine the controversy on its merits, in accordance with the law and evidence, all as provided in 28 U. S. C. 2201-2202.

Respectfully submitted,

HOLBROOK, TARR & O'NEILL,
W. SUMNER HOLBROOK,
FRANCIS H. O'NEILL,
Attorneys for Appellant.

APPENDIX.

A. PERTINENT FEDERAL STATUTES.

1. *Jurisdiction of District Court.*

Title 28 U. S. C. A. (1957 ed.) reads as follows:

Section 1331. Federal question; amount in controversy.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Section 1341. Taxes by States.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Section 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

2. *Jurisdiction of Circuit Court of Appeals.*

Title 28 U. S. C. A. (1957 ed.) reads as follows:

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Section 1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

3. *Federal Statute as to Which Declaratory Judgment Is Sought.*

Public Law 1020, August 7, 1956, 70 Stat. 1109, 1110 section 511 (see note, 42 U. S. C. 1594, 1957 ed.), reads as follows:

Sec. 511. Section 408 of the Housing Amendments of 1955 is amended by adding at the end thereof the following: "Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other service or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property: *And provided further,* That the provisions of this section shall not apply to properties leased pursuant to the provisions of section 805 of the National Housing Act as amended on or after August 11, 1955, which properties shall be exempt from State or local taxes or assessments."

B. PERTINENT CALIFORNIA STATUTES.

1. *Medium of Payment of Taxes.*

California Revenue and Taxation Code, Deering, 1952, reads as follows:

Section 2501. Medium. Taxes shall be paid only in the mediums permitted by this chapter.

Section 2502. Legal tender, etc. Taxes may be paid in legal tender or in money receivable in payment of taxes by the United States.

Section 2511. County warrants. By resolution of the board of supervisors passed by a four-fifths vote, any county warrant for a particular fiscal year may be received in payment of taxes for the same fiscal year levied by the county issuing the warrants if the amount of the warrant does not exceed the amount of taxes being paid. If registered, warrants shall be received only in the order of registration.

2. *Delinquent Penalty on, and Enforcement of, Unsecured Personal Property Taxes.*

Revenue and Taxation Code, Deering 1952 reads as follows:

Section 2914. Collection of taxes by seizure and sale: Property subject to.

Taxes due on unsecured property may be collected by seizure and sale of any of the following property belonging or assessed to the assessee:

(a) Personal property.

(b) Improvements.

(c) Possessory interest.

Section 2922. Time of delinquency: Penalty: Delinquent date falling on Saturday.

Taxes on the unsecured roll if unpaid are delinquent August 31st at 5 p.m., regardless of when the property is discovered and assessed, and thereafter a delinquent penalty of 8 percent attaches to them; provided, that taxes transferred to the unsecured roll under Section 2921.5 of this code shall not be subject to such 8 percent penalty, except where such taxes carried delinquent penalty on the "secured roll" at time the real estate involved was acquired by a political subdivision. If August 31st falls on Saturday, the time of delinquency is 5 p.m. on the next business day.

Section 2916. Notice of sale: Manner of giving notice. Notice when sale continued.

Notice of the time and place of sale shall be given at least one week before the sale by publication in a newspaper in the county, or by posting in three public places. In the event that it is necessary to continue the sale to a later date, notice shall be given as provided above.

Section 2917. Conduct of sale: Amount of property to be sold: What costs include: Tax payment to include costs.

The sale shall be at public auction. A sufficient amount of the property shall be sold to pay the taxes, penalties, and costs.

Costs include but are not limited to:

(a) The costs of advertising.

(b) The same mileage and keeper's fees as allowed by law to the sheriff for seizing and keeping property under attachment.

(c) A fee of not exceeding three dollars ($3) for each seizure and sale, which may be charged by the official making the seizure and sale.

Whenever any of the foregoing costs have been incurred by the county any payment of taxes made thereafter shall include the amount of such costs.

Section 2918. Vesting of title in purchaser.

On payment of the price bid for property sold, the delivery of the property with a bill of sale vests title in the purchaser.

Section 3003. Suit for collection where lien insufficient security.

Where delinquent taxes or assessment are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs.

Section 3004. Evidentiary effect of certified copy of entry. In any suit for taxes the roll, or a duly certified copy of any entry, showing the assessee, the property, and unpaid taxes or assessments, is prima facie evidence of the plaintiff's right to recover.

3. *California Declaratory Relief Statute.*

California Code of Civil Procedure, Deering, 1952, reads as follows:

Section 1060. To Ascertain Status or Construe Writing. Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another,

or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

4. *California Tax Cancellation Statute.*

California Revenue and Taxation Code, Deering, 1952 reads as follows:

Section 4986. Procedure for cancellation.

All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:

(a) More than once.

(b) Erroneously or illegally.

(c) On a portion of an assessment in excess of the cash value of the property by reason of the assessor's clerical error.

(d) On improvement when the improvements did not exist on the lien date.

(e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes, and on property annexed after the lien date by the city owning it.

(f) On property acquired after the lien date by the United States of America if such property upon such acquisition becomes exempt from taxation under the laws of the United States.

(g) On personal property or improvements assessed as a lien against real property acquired after the lien date by the United States of America, the State or by any county, city, school district or other political subdivision which because of the public ownership is not subject to sale for delinquent taxes.

5. *California Tax Protest Statute.*

California Revenue and Taxation Code, Deering, 1952, reads as follows:

Section 5136. Payment Under Protest. After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

Section 5137. Contents of Protest. The protest shall be in writing, specifying:

(a) Whether the whole assessment is claimed to be void or, if only in part, what portion.

(b) The grounds on which the claim is founded.

Section 5138. Court Action. Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such action, or the city may provide that such actions shall be defended by its own counsel.

Section 5139. Conditions. The action may be brought only:

(a) As to the portion of the assessment claimed to be void.

(b) On the grounds specified in the protest.

(c) By the owner, his guardian, executor, or administrator.

Section 5141. Judgment for plaintiff. If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which

recovery is allowed at the rate of 5 percentum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency shall carry penalties, interest and costs.

Section 5142. Recovery of penalties, interest and costs. Where the taxes sought to be recovered have been paid after delinquency, the amount of penalties, interest or costs recoverable in actions brought under this article shall be computed only on the taxes recovered.

6. *California Tax Refund Statute.*

California Revenue and Taxation Code, Deering 1952 reads as follows:

Section 5096. Refunds permissible.

On order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they were:

(a) Paid more than once.

(b) Erroneously or illegally collected.

(c) Paid on an assessment in excess of the cash value of the property by reason of the assessor's clerical error.

(d) Paid on as assessment of improvements when the improvements did not exist on the lien date.

Section 5097. Conditions. No order for a refund under this article shall be made except on a claim:

(a) Verified by the person who paid the tax, his guardian, executor, or administrator.

(b) Filed within three years after making of the payment sought to be refunded.

Section 5098. Court actions.

If an action is brought under this article by any person other than the person who paid the tax, his guardian, executor, or administrator, judgment shall not be rendered for the plaintiff.

Section 5103. Court action authorized.

If the board of supervisors rejects a claim for refund in whole or in part, the person who paid the taxes, his guardian, executor, or administrator may within six months after such rejection commence an action in the superior court against the county or a city to recover the taxes which the board of supervisors or the city council have refused to refund.

If all or any portion of the taxes sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.

Section 5104. Claim for refund required.

No action shall be commenced or maintained under this article unless a claim for refund shall have been filed in compliance with the provisions of this article, and

no recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund.

Section 5105. Interest.

In any action in which recovery of taxes is allowed by the court, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 percentum per annum from the date of the filing of the claim for refund to the date of entry of judgment, and such accrued interest shall be included in the judgment. This section shall not apply to taxes paid before the effective date of this act.

7. *Pertinent California Statutes referrable to Writ of Review.*

California Code of Civil Procedure, Deering, 1952 reads as follows:

Section 1067. Writ of Review defined.

The writ of certiorari may be denominated the writ of review.

Section 1068. When and by what courts granted.

A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

8. *Pertinent California Statutes Referrable to Mandate.*

California Code of Civil Procedure, Deering 1952 reads as follows:

Section 1084. Mandate defined.

The writ of mandamus may be denominated the writ of mandate.

Section 1085. When and by what court issued.

It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law especially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

9. *Pertinent California Statutes Referrable to Injunction.*

California Code of Civil Procedure, Deering 1952 reads as follows:

Section 525. Injunction defined: Who may grant.

An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court.

Section 526. Cases in which injunction may or may not be granted.

An injunction may be granted in the following cases:

* * * * * * * * *

2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action;

* * * * * * * * *

An injunction cannot be granted:

* * * * * * * * *

1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings:

* * * * * * * * *

4. To prevent the execution of a public statute by officers of the law for the public benefit;

No. 15,991

IN THE

United States Court of Appeals

For the Ninth Circuit

HARSH CALIFORNIA CORPORATION, a California corporation, *Appellant,*

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino, *Appellees.*

On Appeal from the Judgment of the United States District Court for the Southern District of California,

BRIEF FOR THE APPELLEES.

ALBERT E. WELLER,
County Counsel of the County of San Bernardino,
By J. B. LAWRENCE,
Deputy County Counsel of the County of San Bernardino,
County Health Building, San Bernardino, California,
Attorneys for Appellees.

FILED
AUG 1958

Table of Contents

	Page
Introduction and summary	1
Federal jurisdiction	4
The California remedies	12
A) Declaratory relief	15
B) Cancellation	16
C) Payment under protest	17
D) Claim and suit	19
E) Extraordinary remedies	22
The effect of the Johnson Act	25
Conclusion	30

Table of Authorities Cited

Cases	Pages
Abrams v. Hart Cotton Mills, 85 F.S. 664	11
All American Aircraft v. Cedarhurst, 201 Fed. 2d 273	12
Arkansas v. K. & T. Coal Co., 183 U.S. 185	12
Association v. Westinghouse, 348 U.S. 437	10
B. & O. R. Co. v. Board, 17 F.S. 170	11
Bayshore San. Dist. v. San Mateo, 48 Cal. App. 2d 337	15
Beaumont v. Texas R. Co., 296 Fed. 523	11
Board of Supervisors v. Stanley, 105 U.S. 305	8, 10
Braswell v. McGowan, 32 F.S. 678	11
Bucklin Coal Mining Co. v. U.C.C., 53 F.S. 484	28
California Physicians' Service v. Garrison, 28 Cal. 2d 790	15
Campbell v. Chase Nat. Bk., 71 Fed. 2d 669	8

Pages
Collier Advertising Service v. N.Y., 32 F.S. 870 28
Columbia Savings Bank v. Los Angeles, 137 Cal. 467 20
Connelly v. San Francisco, 164 Cal. 101 17
Corbett v. Printers and Pub. Corp., 127 Fed. 2d 195 21
Corbus v. Alaska-Treadwell, 99 Fed. 334 8
Crawford v. Pituch, 91 F.S. 626 8

Dallas v. Higginbotham-Bailey-Logan Co., 37 Fed. 2d 513 .. 10
De Luz Homes v. San Diego, 45 Cal. 2d 546 3
Deere v. St. Lawrence River P. Co., 32 Fed. 2d 550 8
DeWitt v. Hays, 2 Cal. 463 22
Doehler Metal Furn. Co. v. Warren, 129 Fed. 2d 43 5
Dows v. City of Chicago, 11 Wall. 108 24
Dyer v. Kazuhisa Abe, 138 F.S. 220 5

Ermolieff v. R.K.O. Radio Pictures, 19 Cal. 2d 543 16
Evans v. San Joaquin, 67 Cal. App. 2d 452 21

First Methodist Church v. Horstmann, 48 Cal. 2d 901 16
First Nat. Bank v. San Francisco, 129 Cal. 96 20
First Nat. Bank v. Williams, 252 U.S. 504 10
First Unitarian Church v. Los Angeles, 48 Cal. 2d 419 16, 18

Geo. F. Alger Co. v. Peck, 74 S. Ct. 605 28
Great Lakes Co. v. Huffman, 319 U.S. 293 28, 29
Gully v. First Nat. Bk., 299 U.S. 109 11

H. J. Heinz Co. v. Owens, 189 Fed. 2d 505 7
Hayes v. Los Angeles, 99 Cal. 74 21
Helms Bakeries v. State Board, 53 Cal. App. 2d 417 21
Hibernia S. & L. Soc. v. San Francisco, 200 U.S. 310 10
Hillsborough Township v. Cromwell, 326 U.S. 620 28, 30
Himmelman v. Spanagle, 39 Cal. 389 14
Hoyt v. Board, 21 Cal. 2d 399 15

In re Winn, 213 U.S. 458 11
Insular Police Comm. v. Lopez, 160 Fed. 2d 673 5
Iowa Loan & Trust v. Fairweather, 252 Fed. 605 10
Irvine v. Sacramento & San Joaquin Dr. Dist., 49 Cal. App. 2d 707 15

Pages

King County v. Seattle School District, 263 U.S. 361 11

Lawrence Print Works v. Lynch, 146 Fed. 2d 996 28
Lord v. Garland, 27 Cal. 2d 840 15
Louisville & N.R. Co. v. Mottley, 211 U.S. 149 8

Marshall v. Crotty, 185 Fed. 2d 622 5
Marshall v. Wyman, 132 F.S. 169 5
Mason v. Johnson, 51 Cal. 612 18
Matthews v. Rodgers, 284 U.S. 521 28
McCarthy v. Watt, 89 F.S. 841 5
Metcalf v. Watertown, 128 U.S. 586 8
Miller v. City of Greenville, 138 Fed. 2d 712 27
Minnesota v. Northern Sec. Co., 194 U.S. 48 11
Monroe v. Detroit M. & T.S.L. Co., 257 Fed. 728 11
Morgan Adams, Inc. v. Los Angeles, 209 Cal. 696 21
Moses Taylor Lodge v. Delaware, L. & W. R. Co., 39 F.S. 456 5

Nevada-Calif. Elec. Corp. v. Corbett, 22 F.S. 951 21

Offutt Housing Co. v. Sarpy County, 321 U.S. 253 3
Outer Harbor Dock Co. v. Los Angeles, 49 Cal. App. 120 ... 22

People v. Weaver, 100 U.S. 539 9
People's Church v. Los Angeles, 48 Cal. 2d 899 16
Peyton v. Railway Express Agency, 316 U.S. 350 10
Prescott v. McNamara, 73 Cal. 236 14
Prince v. San Francisco, 48 Cal. 2d 472 16
Provident Savings v. Ford, 114 U.S. 635 8
Public Service Comm. v. Wycoff, 344 U.S. 237 7, 27
Puerto Rico v. Russell & Co., 288 U.S. 482 8

Reiling v. Lacy, 93 F.S. 462 28
Rensselaer & S.R. Co. v. D. & H. Co., 257 Fed. 555 8
Republic Pictures v. Security First Nat. Bank, 197 Fed. 2d 767 8
Richfield Oil Corp. v. United States, 207 Fed. 2d 864 28
Rickard v. Council, 49 Cal. App. 58 22
Robinson v. Gaar, 6 Cal. 273 22
Rosecrans v. W. S. Lozier, Inc., 142 Fed. 2d 118 11

Pages
S. Siwel Co. v. Los Angeles, 27 Cal. 2d 724 20, 21
Sanders v. Allen, 58 F.S. 417 9
Sears, Roebuck & Co. v. Roddewig, 24 F.S. 321 26
Seber v. Spring Oil Co., 33 F.S. 805 11
Security First National Bank v. Board of Supervisors, 35 Cal. 2d 323 16, 22
Shelton v. Platt, 139 U.S. 591 26
Sherman v. Quinn, 31 Cal. 2d 661 13, 22, 23
Shimola v. Local Board, 40 F.S. 808 5
Shulthis v. McDougal, 225 U.S. 561 8
Simms v. Los Angeles, 35 Cal. 2d 303 13
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 8
Speiser v. Randall, 48 Cal. 2d 903 16
Springer v. United States, 102 U.S. 586 13, 24
St. Johns Church v. Los Angeles, 5 Cal. App. 2d 235 18
Sunset Oil Co. v. California, 87 Fed. 2d 922 12, 13

Union Pacific Rr. Co. v. Ryan, 113 U.S. 516 26

Vista Irrigation District v. Board of Supervisors, 32 Cal. 2d 477 22

West Pub. Co. v. McColgan, 138 Fed. 2d 320 28

Rules

Federal Rule of Federal Procedure, Rule 65 5

Statutes

California Constitution, Art. XIII, Sec. 1 20
Code of Civil Procedure, Sec. 462 6
Code of Civil Procedure, Sec. 1060 15
Code of Civil Procedure, Sec. 1062 16
Code of Civil Procedure, Sec. 1086 24
Penal Code, Sec. 1096 30
Political Code, Sec. 3819 (Stats. 1895, p. 335) 17

Pages

Revenue and Taxation Code, Sec. 2914 13
Revenue and Taxation Code, Sec. 3003 13
Revenue and Taxation Code, Sec. 5096 19, 22, 24
Revenue and Taxation Code, Sec. 5096(b) 19
Revenue and Taxation Code, Sec. 5105 19, 23, 27
Revenue and Taxation Code, Sec. 5107 19
Revenue and Taxation Code, Sec. 5136 17, 22
Revenue and Taxation Code, Sec. 5137 17
Revenue and Taxation Code, Sec. 5141 17, 27
Revenue and Taxation Code, Sec. 5143 17
United States Code, Title 28, Sec. 41(8) 10
United States Code, Title 28, Sec. 337 5
United States Code, Title 28, Sec. 1331 4, 10
United States Code, Title 28, Sec. 1337 10, 12
United States Code, Title 28, Sec. 1341 2, 25
United States Code, Title 28, Sec. 1348 11
United States Code, Title 28, Sec. 1441 11
United States Code, Title 28, Sec. 1651 5
United States Code, Title 28, Sec. 2201 5

Texts

1 Barron & Holtzoff, Federal Practice and Procedure:
Sec. 46 5
Sec. 350 3
27 Cal. Jur. 2d 152 24
Moore's Federal Practice 2.08 [5], 65.03 [2], 65.03 [3] 6
25 So. Cal. Law Review, p. 395, 402, n. 49 17
25 So. Cal. Law Review, p. 403-404, footnote 28 23
27 So. Cal. Law Review, p. 415 17, 23
1 Witkin, California Procedure, 859-860 24

No. 15,991

IN THE

United States Court of Appeals

For the Ninth Circuit

HARSH CALIFORNIA CORPORATION, a California corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellees.

On Appeal from the Judgment of the United States District Court for the Southern District of California,

BRIEF FOR THE APPELLEES.

INTRODUCTION AND SUMMARY.

This appeal is from two orders of the District Court denying injunctive and declaratory relief. They do not involve either the meaning or validity of the amendment to the National Housing Act quoted in Appellant's Brief (p. 2, footnote; p. 3, appendix).

The merits of the position of Appellant Harsh with respect to its tax liability are therefore not in issue. *For the sake of this argument only* it will be conceded that the amendment is valid and that it constitutes a valid defense to any liability Harsh would otherwise have had for the payment to Appellee County of any tax; however, we also ask the Court to assume that these propositions are being disputed in good faith by Appellees, no allegation of fraud or malice having been made.

The District Court found that Harsh "has a plain, speedy and efficient remedy in the courts of the State of California" (Trans. pp. 71 and 72), denied a preliminary injunction against the collection of the tax, and dismissed the action *(ibid.),* while expressly avoiding an adjudication on the merits, (Trans. p. 73). The District Court's orders were explicitly based on the provisions of 28 U.S.C. 1341 (the Johnson Act) (Appellant's Brief—Appendix, p. 1).

The issues raised therefore are these:

(1) Did the District Court have jurisdiction? (Jurisdiction of the Court of Appeals is conceded if the District Court had jurisdiction.) We assert that it did not.

(2) Does Harsh have a plain, speedy and adequate remedy in the courts of California? We assert that Harsh does.

(3) If Harsh has such a remedy, does that fact, in the light of the Johnson Act, justify the denial to Harsh of

(a) Injunctive relief?

(b) Declaratory relief?

We assert that it justifies the denial of both.

Appellant's "Statements of Facts" (Brief, pp. 5-7) is correct, with the following exceptions:

(1) Not "all facts set forth in the complaint" but all facts *well pleaded* in the complaint are admitted. (1 *Barron & Holtzoff, Federal Practice and Procedure,* § 350.)

(2) The taxability of Harsh's possessory interest does not arise from Federal consent. The interest is privately owned, and therefore not exempt (*Offutt Housing Co. v. Sarpy County,* 321 U.S. 253; *De Luz Homes v. San Diego,* 45 Cal. 2d 546); no consent is necessary. In the *Offutt* case *(supra)* there is reference to consent, because the property there was within the exclusive jurisdiction of the United States; no such circumstance is alleged or exists in the case at bar.

(3) Captain Hunter (Brief, p. 6) did not determine "that there was a 'deduction' offset, or credit" or that "such 'deduction' exceeded the amount of the tax" or that "there was no sum owing at all to the County". Captain Hunter determined "the sum of $27,759.00 to be the amount equal to the sum of payments made by the Federal Government to the County of San Bernardino, California, with respect to . . . Barstow Garden Homes . . . applicable to the 1957-58 tax year", and that this sum allegedly paid to the

County was comprised of sums paid for school construction and school maintenance and operation (Trans., p. 23). The remainder of Harsh's statement of what Captain Hunter determined are merely Harsh's conclusions. (This misquotation of Captain Hunter is repeated on page 8 of Appellant's Brief.)

FEDERAL JURISDICTION.

In the District Court Judge Byrne (who, contrary to the statements on pages 17 and 33 of Appellant's Brief, impressed Appellees' counsel as one of the most unconfused and unconfusable judges counsel had ever seen) said "I think it is a very, very close case as to whether the court has jurisdiction" because, he said, the basis of this case is a California tax; if a Federal law gives a defense, it may be interposed in a state court action to collect the tax. He therefore ordered both parties to file special memoranda of points and authorities on the jurisdiction question. We did so; however, Appellees at all times asserted as their primary defense the Johnson Act, as being clear and certain, and the Court ultimately decided the case on that ground without any specific finding on the jurisdictional issue. However, the Court did *not* find any fact indicating that the Court did have jurisdiction (Trans. p. 71); the facts of this case have not yet been put in issue, and no evidence was taken.

In order to establish jurisdiction, two points must be found (28 U.S.C. 1331; Appellant's Brief, Appen-

dix, p. 1): (1) There must be a civil action; (2) The matter in controversy must arise under the laws of the United States. Both of these matters must be factually pleaded.

It is basic that the power of a Federal Court to issue an injunction is dependent upon the existence of some recognized ground of Federal jurisdiction.

> 1 *Barron & Holtzoff, Federal Practice & Procedure,* § 46.

28 U.S.C. § 377 (now § 1651) does not widen the jurisdiction of the Federal Court.

> *Shimola v. Local Board,* 40 F.S. 808, 809.

Neither does *Federal Rule of Civil Procedure* No. 65.

> *Moses Taylor Lodge v. Delaware, L. & W. R. Co.,* 39 F.S. 456, 457.

Neither the remedy of injunction (28 U.S.C. 1651) nor the remedy of declaratory judgment (28 U.S.C. 2201; Appellant's Brief, Appendix, p. 1) extends the Court's jurisdiction.

> *Marshall v. Crotty,* 185 Fed. 2d 622, 626-627;
> *Insular Police Comm. v. Lopez,* 160 Fed. 2d 673, 677 (*cert. den.* 331 U.S. 855);
> *Doehler Metal Furn. Co. v. Warren,* 129 Fed. 2d 43, 45 (*cert. den.* 317 U.S. 663);
> *Dyer v. Kazuhisa Abe,* 138 F.S. 220, 228-229, 231-232;
> *Marshall v. Wyman,* 132 F.S. 169, 173-174;
> *McCarthy v. Watt,* 89 F.S. 841, 842-843.

Please note particularly the discussion in the *Insular Police* case *(supra)* distinguishing the power to employ remedies from the basic question whether there is a civil action before the Court; this case involved mandamus, but mandamus stands on a parity with injunction with respect to 28 U.S.C. 1651, and the same principles must govern both.

(For further discussion of the limitations on injunction, see *Moore's Federal Practice,* 2.08 [5] 65.03 [2], and 65.03 [3].)

The substance of this litigation—the reason why Harsh wants declaratory relief and an injunction; the controversy to be resolved, and the threat to be enjoined—is that the County wants to collect a tax under State law and Harsh thinks that the tax is not collectible. This is not a matter within Federal jurisdiction, and no mere remedy can bring it in.

Thus we arrive at the second part of the jurisdictional argument: that the "matter in controversy" does not "arise under the laws of the United States."

We admit freely that in the collection of this tax a law of the United States will be invoked by the taxpayer. We should perhaps say, in view of the excursion outside the record in Appellant's Brief, page 19, that since the commencement of this Federal action, the County *has* sued in the State Court to collect this tax, that Harsh has pleaded the Housing Act in its answer, and that the County is deemed to have controverted the answer, placing this matter among the facts in issue (C.C.P. Sec. 462). However, the

County has not challenged the legal sufficiency of this defense by general demurrer, nor has the County attempted to strike this defense. The County did, as Appellant states, successfully oppose the intervention of the United States Attorney, and the remedy of injunction (on the ground of adequate legal remedy), but the Federal-law defense is still in the lawsuit. The validity of this defense is denied, but not its availability.

However, the "matter in controversy" is still the amount, if any, of local taxes due.

> "When a complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. . . . Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law."
>
> *Public Service Comm. v. Wycoff,* 344 U.S. 237, 248 (involving both declaratory relief and injunction).

Neither injunctive relief nor declaratory relief can be allowed to circumvent the rule against staying proceedings in a state court.

> *H. J. Heinz Co. v. Owens,* 189 Fed. 2d 505, 508, (9th Cir.), *Reh. den.* 191 Fed. 2d 257, *cert. den.* 342 U.S. 905, *reh. den.* 342 U.S. 934.

The mere fact that Harsh's asserted right arises under Federal law does not confer jurisdiction.

Republic Pictures v. Security 1st Nat. Bank, 197 Fed. 2d 767 (9th Cir.);
Crawford v. Pituch, 91 F.S. 626;
Shulthis v. McDougal, 225 U.S. 561, 569;
Puerto Rico v. Russell & Co., 288 U.S. 482, 484;
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667.

In further support of the proposition that the "matter in controversy" does not arise under Federal law, see:

Provident Savings v. Ford, 114 U.S. 635;
Metcalf v. Watertown, 128 U.S. 586;
Louisville & N. R. Co. v. Mottley, 211 U.S. 149, 152;
Corbus v. Alaska-Treadwell, 99 Fed. 334, aff'd 187 U.S. 447, 454, 466;
Rensselaer & S.R. Co. v. D. & H. Co., 257 Fed. 555, *cert. den.* 250 U.S. 642;
Deere v. St. Lawrence River P. Co., 32 Fed. 2d 550;
Campbell v. Chase Nat. Bk., 71 Fed. 2d 669, *cert. den.* 293 U.S. 592.

In a case similar to the case at bar, *Board of Supervisors v. Stanley,* 105 U.S. 305, a state validly assessed shares of a national bank. A Federal law nevertheless compelled a *deduction* based on debts of the shareholders; aside from such debts, the tax as well as the assessment was valid. But, the Court said,

> ". . . In cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void. The assessing officers acted within their authority in such cases until they were notified in some proper manner that the shareholder owed just debts which he was entitled to have deducted. If they then proceeded in disregard of the Act of Congress, the assessment was erroneous, and the case of *People v. Weaver* shows how that error could be corrected." (A reading of the decision will show that by "could" the Court meant "should".)

And what was the procedure in *People v. Weaver* (100 U.S. 539)? It was to litigate in the State Courts.

As Appellant points out (for example, see Brief, p. 14), the Housing Act provides no new remedy to accompany the new deduction from the local property tax. We suppose Appellant will concede that jurisdiction over the collection of local property taxes has normally in the past been in the State Courts. But where the State Courts have long had jurisdiction, a Federal statute will not be construed to withdraw jurisdiction without a distinct manifestation of that Congressional intention.

Sanders v. Allen, 58 F.S. 417, 420.

Therefore, rather than inferring that the Housing Act authorizes the extraordinary interference with local tax collection attempted here, we should construe the Act as relying upon State Courts, State officers, and State procedures for the proper computation and collection of the tax under all applicable laws, including this one.

When a statute lacks affirmative language showing that Congress intends to burden the Federal Courts with a new source of litigation, the statute should not be construed to enlarge the Federal jurisdiction.

Association v. Westinghouse, 348 U.S. 437, 460.

Appellant cites (Brief, p. 13) *Dallas v. Higginbotham-Bailey-Logan Co.,* 37 Fed. 2d 513 (a case antedating the Johnson Act), in which property involved was wholly *exempt,* not taxable subject to a deduction. The Court does not cite *Board of Supervisors v. Stanley, supra,* involving a deduction, but instead cites *Iowa Loan & Trust v. Fairweather,* 252 Fed. 605 (which, at page 607, makes just this distinction between excessive taxation and taxation of exempt property) and three Supreme Court cases which all came up through the *State* Courts and did not involve District Court jurisdiction. (Note particularly *Hibernia S. & L. Soc. v. San Francisco,* 200 U.S. 310, in which the California taxpayer had paid his tax under protest and sued for refund in the California Court; the propriety of asserting a Federal exemption in a California Court was not questioned (139 Cal. 205).)

Peyton v. Railway Express Agency (316 U.S. 350; Appellant's Brief, p. 12) was based on 28 U.S.C. § 41 (8), now 28 U.S.C. § 1337. This is not relevant to 28 U.S.C. § 1331; § 1337 lacks the "matter in controversy" requirement. Also, this was not an attempt to anticipate a State suit by commencing a Federal action on what should have been a defense.

First Nat. Bank v. Williams, (252 U.S. 504; Appellant's Brief, p. 12) based jurisdiction upon the

explicit terms of the statutory predecessor of 28 U.S.C. § 1348.

King County v. Seattle School District, (263 U.S. 361; Appellant's Brief, p. 11) was a suit to collect money apportioned to plaintiff by Act of Congress. Obviously, then, plaintiff's primary right was Federal. But Harsh's primary right to his money is not based on an Act of Congress; it is simply Harsh's money, collected in the ordinary course of business. His defense, in our state suit for a local tax, sets up a Federal right, but this does not confer Federal jurisdiction in these facts.

That a Federal-law defense does not create Federal jurisdiction, see the following cases holding that a Federal-law defense does not bring a State suit within the removal statute (28 U.S.C. § 1441):

Gully v. First Nat. Bk., 299 U.S. 109, 113;

In re Winn, 213 U.S. 458, 464-465;

Minnesota v. Northern Sec. Co., 194 U.S. 48, 64 (no removal unless County could have sued Harsh in Federal Court);

Rosecrans v. W. S. Lozier, Inc., 142 Fed. 2d 118, 121;

Beaumont v. Texas R. Co., 296 Fed. 523, 525-526;

Monroe v. Detroit M. & T.S.L. Co., 257 Fed. 728, 784;

Abrams v. Hart Cotton Mills, 85 F.S. 664, 666;

Seber v. Spring Oil Co., 33 F.S. 805, 807;

Braswell v. McGowan, 32 F.S. 678;

B. & O. R. Co. v. Board, 17 F.S. 170, 176 (cannot circumvent by injunction).

> "But even assuming that the bill showed upon its face that the relief sought would be inconsistent with (Federal law), it would only demonstrate that the bill could not be maintained at all and not that the cause of action arose under (Federal law.)"
>
> *Arkansas v. K. & T. Coal Co.,* 183 U.S. 185, 190.

These cases establish that it is the cause of action of the party seeking to change the *status quo* (here the County) which must be Federal to create Federal jurisdiction, not the defense.

Although Appellant accurately quotes an excerpt from *All-American Aircraft v. Cedarhurst,* 201 Fed. 2d 273 (Brief, p. 13), it is apparent from reading of the decision (and the decision below—106 F.S. 521) that jurisdiction as such was not discussed at all. Jurisdiction under 28 U.S.C. § 1337, however, was apparent.

THE CALIFORNIA REMEDIES.

Assuming that, as Appellant contends, a valid Federal law has set a ceiling upon the amount of tax which may be levied by local taxing agencies upon Appellant's property, is California's legislation so inadequate as to provide no remedy to Appellant, so that Appellant is compelled to invent a Federal remedy or suffer in silence?

To answer this question we must turn to California statutes and California decisions to see what California Courts would do. Even if *Sunset Oil Co. v.*

California (87 Fed. 2d 922; Appellant's Brief, p. 15) meant what Appellant says it means, it would be merely secondary authority on the law of California.

The California statutes, like those of many other jurisdictions, embody the policy that "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason". *Springer v. United States,* 102 U.S. 586, 594, quoted in *Sherman v. Quinn,* 31 Cal. 2d 661, 665. Until the illegality of the tax has been established in a courtroom, the local government should not be deprived of the money (see *Simms v. Los Angeles,* 35 Cal. 2d 303, 315).

Therefore taxes on property which is assessed on the "unsecured roll" (as is Harsh's property), may be summarily collected by seizure and sale without judicial action (Trans., p. 5; Rev. & Tax. Code Sec. 2914—printed in Appellant's Brief, Appendix, p. 4). However, this power is seldom exercised, and has never been exercised in any of our long tax litigation with the Wherry Housing interests.

The only alternative mode of collection is by suit in the State Superior Court (*Rev. & Tax. Code,* Sec. 3003), which, as noted by Appellant (Brief, p. 19), the County is now pursuing. In such a suit the plaintiff of course must prove that the tax is valid and due and the defendant may set up invalidity as a defense, as Harsh has done in the California case now pending. We do not understand why Appellant has not dis-

cussed this taxpayer's remedy in its otherwise thorough brief.

Appellant may, however, say that it *has* discussed this remedy, commencing on page 15 of its brief. But we should not overlook the elementary distinction between counter-claims and cross-complaints, which Appellant refers to on page 15, and mere passive defenses. By counter-claim or cross-complaint, a defendant attempts, directly or indirectly, to satisfy his own claim against the plaintiff. The *Sunset Oil* case says, quite correctly, that a claim which could not be the basis of a suit against the State cannot be the basis of a counterclaim. Since the statute there involved provided no judicial remedy, but only an administrative remedy which defendant had failed to utilize, such a counterclaim would obviously circumvent the statute and permit the defendant to benefit judicially by a claim which was not judicially enforceable.

But the County owes Harsh nothing. Harsh has no claim, nor did it ever have a claim against the County, and therefore no sovereign-immunity problem arises. The California cases cited by Appellant (*Himmelman v. Spanagle,* 39 Cal. 389; *Prescott v. McNamara,* 73 Cal. 236) have nothing to do with this situation. Harsh has merely claimed a *deduction,* which was disallowed by the County. Harsh's contention is that the County seeks money beyond the amount to which (if any) the County is entitled; to assert this position is no counterclaim but a mere defense. This gap cannot be bridged by the ambiguous term "offset" (which is not

used in the statute). There is no California law against asserting *defenses* to County suits or deductions from local taxes; such a law would probably be unconstitutional.

Harsh cites no authority to indicate that such a defense is not maintainable; none exists.

Thereafter, Harsh (commencing on p. 20) discusses four possible remedies in the State Courts.

A) Declaratory Relief.

Viewing the question in the abstract, Harsh might be correct that a taxpayer could not attack a tax by declaratory relief in California. In this regard California legislative policy might conform to that embodied by Congress in the Johnson Act.

It was formerly held by the District Court of Appeal that the state and its subdivisions were not subject to declaratory relief (*Irvine v. Sacramento & San Joaquin Dr. Dist.,* 49 Cal. App. 2d 707; *Bayshore San. Dist. v. San Mateo,* 48 Cal. App. 2d 337). However, this position (along with the *Mayshore* and *Irvine* cases) was expressly disapproved by the State Supreme Court in *Hoyt v. Board,* 21 Cal. 2d 399; *Lord v. Garland,* 27 Cal. 2d 840; *Calif. Physicians' Service v. Garrison,* 28 Cal. 2d 790.

The language of C.C.P. Sec. 1060 (App.'s Brief, pp. 20-21) relating to a "declaration of his rights and duties with respect to another" is broad enough to apply to Harsh; it is not, in its terms or otherwise, restricted to the interpretation of instruments or property rights.

Furthermore, in the Loyalty-Oath tax cases (*First Unitarian Church v. Los Angeles,* 48 Cal. 2d 419; *People's Church v. Los Angeles,* 48 Cal. 2d 899; *First Methodist Church v. Horstmann,* 48 Cal. 2d 901; *Prince v. San Francisco,* 48 Cal. 2d 472; *Speiser v. Randall,* 48 Cal. 2d 903) plaintiffs sought a refund *and* declaratory relief. Some had favorable results in the trial court, but these judgments were reversed in the State Supreme Court on other grounds without any indication that the remedy did not exist. Others failed in the Superior Court; these judgments were affirmed by the State Supreme Court, again without discussion of the availability of this remedy. The U. S. Supreme Court ruled in favor of plaintiffs in all cases, again without ruling on this particular remedy (78 S. Ct. 1332-1354, 1380). At no time in the recorded cases was the remedy questioned.

Declaratory relief in California is a cumulative remedy (C.C.P. Sec. 1062) which may be granted in spite of the existence of other remedies (*Ermolieff v. RKO Radio Pictures,* 19 Cal. 2d 543, 547).

B) Cancellation.

Without accepting Appellant's theories (p. 22) about this remedy, we agree with his conclusion that *Security-First National Bank v. Board,* 35 Cal. 2d 323, 327, held that cancellation of a void tax, although authorized, cannot be compelled by mandamus. However, it should be noted that this relief was held "not available . . . because petitioner had an adequate remedy at law by an action for refund."

C) Payment Under Protest.

On page 23, citing no authority except the sections of the statute, Harsh argues that the remedy of payment under protest is not applicable for two reasons. First, *Rev. & Tax. Code* Sections 5136-5143 are limited to defects in the assessment. Second, because the tax was levied and payable before Capt. Hunter's "determination", *it was not void.*

As to the first reason, we might content ourselves with citing the article in 25 *So. Cal. L. Rev.* 395, 402, n. 49, in which Mr. Holbrook and Mr. O'Neill, the authors, (and counsel for Appellant here) say, with reference to Sec. 5137, ". . . The present Revenue and Taxation Code seems to use the word 'assessment' rather loosely as also including the tax itself." The same authors, in 27 *So. Cal. L. Rev.* 415, 437, discuss the protest procedure without limiting it to defects in the assessment. Since the purpose of the latter law review article was to point out limitations in the existing law, we are sure that the authors would have pointed out the alleged restriction to defective assessments if they believed it to exist.

The statute providing for protest and suit was construed in *Connelly v. San Francisco,* 164 Cal. 101, 103, when it was more strictly worded in terms of "assessment" than it is today. *Pol. Code* Sec. 3819 (Stats. 1895, p. 335) reads as follows:

> "At any time after the assessment book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment

> is void in whole or in part, may pay the same to the Tax Collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county, in the Superior Court, to recover back the tax so paid under protest."

Nevertheless, the Court refused to confine the remedy to claims based upon illegality of the *assessment.*

As to Harsh's second reason, it is a mere speculation. Harsh gives no explanation *why,* if the tax became "void in whole or in part" on August 9, when Captain Hunter made his "determination" (Trans. p. 23), the statutory remedy could not then apply. No such restriction exists in the statute or any other authority.

See *Mason v. Johnson,* 51 Cal. 612, in which the protest procedure was approved; there the assessment was valid when made, but a change in extrinsic circumstances caused the tax to be invalid. See also *St. Johns Church v. Los Angeles,* 5 Cal. App. 2d 235, 240; *First Unitarian Church v. Los Angeles,* 48 Cal. 2d 419 (assessment valid under state law attacked on Federal ground; choice of remedy not questioned).

D) Claim and Suit.

Appellant's authority for disallowing the remedy of claim and suit (*Rev. and Tax. Code* Secs. 5096-5107) is even more slender. First (Brief, pp. 24-26), Appellant belabors the point that if *Harsh had paid* before Captain Hunter made his "determination", Harsh could not have recovered. This is idle talk; Harsh has not paid.

On page 27, Harsh gets down to relevant facts and declares that "the tax itself (is) *valid.*" We welcome this concession, but if Appellant means this, what is he doing in Court? Is Appellant asking the Courts to enjoin the collection of a valid tax? The Housing Act (Brief, p. 2) on which Harsh relies, says that "no such taxes . . . shall exceed" a certain amount, less another amount. If, as Harsh repeatedly asserts, our tax did exceed the remainder left after this subtraction (because the subtrahend (Hunter's figure) exceeds the minuend (Harsh's tax computed without the deduction)), then Harsh must believe our tax to be wholly invalidated by the Federal law. The complaint (Trans., p. 12) plainly alleges that the tax is erroneous and illegal. Likewise, its collection must be illegal, and the tax may be recovered under *Rev. and Tax. Code* Sec. 5096 (b), after payment.

In short, if the tax is valid, let Harsh pay it and be quiet; if the tax is not valid, let Harsh pay it and sue for a refund.

Also on page 27, Harsh seems to play on words. Of course, the Tax Collector has a duty to collect any tax that is on the rolls. But if that tax is or has become

illegal, the tax is "illegally collected", in spite of procedural regularity. (See, for example, *S. Siwel Co. v. Los Angeles,* 27 Cal. 2d 724.)

But, says Appellant (p. 27), there is "no administrative or judicial mode provided by state statute" by which the deduction may be established. To this there are two answers.

First, it is false. If the tax is now illegal, Harsh can proceed either under the protest-payment or claim-and-suit procedures. These procedures are not restricted to an illegality arising under *California* law. A valid, paramount Federal law renders illegal that which it prohibits. No California law can create a legal duty to do anything forbidden by Federal law. If Federal legislative action has rendered our tax illegal, no Federal judicial action is needed to confirm this; our State Courts will apply all relevant laws, or, in due time, the United States Supreme Court will make them do so. See *Columbia Savings Bank v. Los Angeles,* 137 Cal. 467 (U.S. Bonds), and *First National Bank v. San Francisco,* 129 Cal. 96 (National Bank), in which Federal immunities were enforced in California Courts. See also Art. XIII, Sec. 1, California Constitution, exempting from State taxation any property exempt "under the laws of the United States."

Second, however, if the Federal legislative action has *not* rendered our tax illegal, the Federal Court cannot step in and create an illegality. "No mode has been provided" to accomplish this paradox. If the tax

is legal, Harsh has no standing in any Court, either to enjoin it or to resist our suit.

As appellant's final argument against the claim-and-suit procedure, the suggestion is made that "the ground of 'error' or 'illegality' must be one running to the person claiming the refund". No authority is cited for this flight of fancy. Of course it is true that only the person who has paid can get the money back, but the cause of the illegality need not be connected to him personally. Thus in *Hayes v. Los Angeles,* 99 Cal. 74, one who paid a tax was permitted to sue for a refund which was due him because someone else had previously paid the same tax on the same property. The remedy of payment under protest is also available in these circumstances (*Morgan Adams, Inc. v. Los Angeles,* 209 Cal. 696).

The remedy of claim and suit has been held adequate in the following cases in addition to those already cited:

Nevada-Calif. Elec. Corp. v. Corbett, 22 F.S. 951; 954 (Calif. Use Tax);

Corbett v. Printers and Pub. Corp., 127 Fed. 2d 195 (Calif. Sales Tax);

Helms Bakeries v. State Board, 53 Cal. App. 2d 417, *cert. den.* 318 U.S. 756 (Sales Tax).

Like the protest procedure, the claim procedure applies to taxes which are erroneously or illegally collected even if not erroneously or illegally levied.

Siwel v. Los Angeles, 27 Cal. 2d 724, 730-731;

Evans v. San Joaquin, 67 Cal. App. 2d 452, 454-455.

Although we have followed Appellant's argument to the extent of discussing the protest method (*Rev. and Tax. Code* Sec. 5136) and the claim method (Sec. 5096) separately, the two remedies are concurrent.

Outer Harbor Dock Co. v. Los Angeles, 49 Cal. App. 120.

Therefore, they are both available for an attack on a tax if either is available; the taxpayer may follow either procedure, or both. The decisions which authorize either procedure are authority for the other as well.

E) Extraordinary Remedies.

Lastly, Harsh complains (pp. 29-30) that mandamus, certiorari and injunction are not available to him in the State Courts. This is indeed true; as he notes on pages 19 and 30, he has attempted to get an injunction in the California Court by cross-complaint, and our demurrer was sustained without leave to amend. The Court took this action because, according to a firm and certain line of precedents, the statutory remedies in California are adequate and *therefore* the extraordinary remedies do not lie.

Security First National Bank v. Board of Supervisors, 35 Cal. 2d 323;

Vista Irrigation District v. Board of Supervisors, 32 Cal. 2d 477;

Sherman v. Quinn, 31 Cal. 2d 661;

Rickard v. Council, 49 Cal. App. 58;

Robinson v. Gaar, 6 Cal. 273, 275;

DeWitt v. Hays, 2 Cal. 463, 469.

At least since the enactment of the provisions for 5% interest in California *Revenue and Taxation Code* Section 5105, it has not been questioned in California that the legal remedy is adequate, and that the remedy of injunction no longer lies against the collection of an illegal property tax (if it ever did lie).

See *California Property Tax Trends* by W. Sumner Holbrook, Jr., and F. H. O'Neill, 25 So. Cal. L. Rev. 403-404, footnote 28, in which the authors suggest that an injunction might be employed only if a lessee is under compulsion to pay a tax on property owned by his landlord; however, in the case at bar, the property tax is upon a possessory interest and it is not disputed that Harsh is the owner of this interest. Further to the effect that neither injunction nor mandate is available in California, see *The California Property Tax,* Holbrook and O'Neill, 27 So. Cal. L. Rev. 415, 436, wherein the authors state:

> ". . . The former existing right to injunction was an extreme remedy. It was permitted primarily because until December, 1941, a taxpayer could not, on a refund or protest suit, recover any more than the principal of the illegal tax. Since that date the taxpayer has been able to recover interest as well as principal of the illegal charge."

Concerning the adequacy of California judicial procedures for recovery of taxes collected erroneously or illegally, the California Supreme Court stated in the case of *Sherman v. Quinn,* 31 Cal. 2d 661, 665:

> "However, should an assessor deny the exemption to a veteran, an adequate procedure is pro-

vided by statute whereby taxes erroneously levied and collected may be refunded, together with interest thereon, upon a claim therefor. (See Revenue and Taxation Code Sec. 5096 *et seq.*) This form of procedure, widely used in the tax field, is based upon the principle that 'delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.' (*Dows v. City of Chicago,* 11 Wall. 108, 110, 20 L. Ed. 65). The veteran, therefore, has a plain, speedy and adequate remedy in the ordinary course of law, and mandamus is not available. (C.C.P. Sec. 1086). 'The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason.' *Springer v. U.S.,* 102 U.S. 586, 594."

In the light of these fixed principles of California law, which have stood unquestioned for a number of years, the California Superior Court struck out an attempt by Harsh to obtain injunctive relief. As observed by Appellant, however, (Brief, p. 29) the reasoning of the California Courts is identical with the policy of the Johnson Act—that is, that injunctions should not issue when there is an adequate legal remedy (27 *Cal. Jur.* 2d 152 (citing 12 cases); 1 Witkin, *California Procedure,* 859-860).

The essence of Appellant's brief is the argument that the statutory remedies are *not* adequate; Appellant asks the Federal Courts to declare an inadequacy

that the State Courts do not find. But, if this inadequacy were to be found by the State Courts, then the State Courts would provide an adequate extraordinary remedy; there is still no need for a Federal Court to issue an injunction. The case for issuing an injunction cannot be better in the Federal Court than in the State Court. Our State Courts provide a complete set of legal and equitable remedies; Federal intervention is superfluous.

Harsh's arguments (Brief, p. 30) against State injunctive relief require little comment. First, if the tax is illegal because of the disallowance of a statutory deduction, this fact may be proved in the same way as any other fact is proved. Harsh is now trying to prove this very fact in the State litigation.

Second, Appellees caused the striking of the cross-complaint in the State suit on the sole ground of an adequate legal remedy. Appellees are certainly not "estopped" to assert that State injunctive relief *would* be available if no other adequate legal remedy existed. If any State Court finds that Harsh has no legal remedy (for any procedural reason), that same Court will restore the cross-complaint for injunction.

THE EFFECT OF THE JOHNSON ACT.

The Johnson Act (28 U.S.C. 1341) (Appellant's Brief, Appendix, p. 1) prohibits the District Courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State

law where a plain, speedy and efficient remedy may be had in the Courts of such State." We have now shown that several such remedies may be had in the Courts of California; also we rely on the proposition that when the Federal Courts consider the use of equitable powers to thwart a local tax, the legal remedy is presumed to be adequate.

Shelton v. Platt, 139 U.S. 591;
Union Pac. Rr. Co. v. Ryan, 113 U.S. 516, 525.

The question next arises: "Is this an action to enjoin, suspend or restrain the assessment, levy or collection of a California tax?"

Appellant is now attempting to characterize his suit as merely one for declaratory judgment (Brief, p. 2), with injunctive relief as "ancillary" (Brief, p. 3). This is not the song he sang in the District Court. His complaint (Trans., p. 3) is captioned "Complaint for Declaratory Relief, Injunction and Restraining Order" and his prayer (Trans., pp. 14-16) is not only for a declaration but also "that this Court permanently enjoin and restrain the defendants" from "doing any and all acts to enforce the said tax". Paragraph I of the Findings (Trans., p. 71) is therefore literally and exactly correct, in spite of Appellant's charge of error and confusion (Brief, p. 17).

The Johnson Act is broadly construed, and a suit to enjoin the means of enforcement of a tax will not be distinguished from a suit to enjoin collection.

Sears, Roebuck & Co. v. Roddewig, 24 F.S. 321, 324-325.

Further to illustrate Appellant's mysterious shift in emphasis, we note that on or about September 23, 1957, Harsh filed in this action a five-and-one-half page memorandum of points and authorities, commencing as follows: "In this action, plaintiff seeks to restrain the collection of a local tax . . ." In this document, declaratory relief is not mentioned.

Plainly, as this action was originally conceived, it was for *both* declaratory relief and injunction, equally. Our motion to dismiss (which is only extracted in Trans., pp. 30-31) dealt fully with both remedies, and both were equally denied (Trans., pp. 71-74). Plainly also, the injunctive element is directly contrary to the Johnson Act.

(We also note that no serious or irreparable injury is shown. Any illegal part of the tax may be recovered with interest at 5% (*Rev. and Tax. Code, Sec.* 5105, 5141), a rate probably exceeding that now being earned by the sum impounded by the F.N.M.A. (Trans., p. 30). Injunction does not lie without a threat of irreparable injury. (*Public Service Comm. v. Wycoff,* 344 U.S. 237, 240-241).)

But has Harsh gained a more favorable position under the Johnson Act by soft-pedaling the injunctive aspect and emphasizing declaratory relief? The authorities are overwhelming to the effect that the Johnson Act applies as much to one as to the other.

The principle is best stated in *Miller v. City of Greenville,* 138 Fed. 2d 712, 719, as follows:

> ". . . But the facts in this case do not justify maintenance of this action under the Federal

> declaratory judgment statute . . . The object of the suit is to avoid assessment and collection of state taxes, and the same considerations upon which Federal courts of equity have declined, save in exceptional cases, to relieve against state taxes claimed to be unlawful, are controlling in suits under the declaratory judgment statute . . ."

See also *West Pub. Co. v. McColgan,* 138 Fed. 2d 320, 324-327 (declaratory relief held included in Johnson Act; remedies of payment and suit for refund of California Corporation Income Tax held adequate so as to deprive the Federal Court of jurisdiction in a suit for declaratory relief and injunction); *Bucklin Coal Mining Co. v. U. C. C.,* 53 F.S. 484, 486-487 (action for injunction and declaratory relief dismissed); *Richfield Oil Corp. v. United States,* 207 Fed. 2d 864, 870 (limitations of injunction and declaratory relief); *Reiling v. Lacy,* 93 F.S. 462, 468-470, (appeal dismissed 341 U.S. 901); *Collier Advertising Service v. N. Y.,* 32 F.S. 870, 872; *Lawrence Print Works v. Lynch,* 146 F. 2d 996, 998 (denying the equitable remedy of specific performance); *Matthews v. Rodgers,* 284 U.S. 521; *Geo. F. Alger Co. v. Peck,* 74 S. Ct. 605, 98 L. Ed. 1148 (chambers opinion of Justice Reed).

The Supreme Court, treating the subject of declaratory relief in the case of *Hillsborough v. Cromwell,* 326 U.S. 620, (in which the New Jersey remedy was held to be inadequate), stated on page 623:

> ". . . we held in *Great Lakes Dredge and Dock v. Huffman, supra,* (319 U.S. 293) that the policy which led Federal courts of equity to refrain

from enjoining the collection of allegedly unlawful state taxes should likewise govern the exercise of their discretion in withholding relief under the Declaratory Judgment Act . . ."

In the cited case of *Great Lakes Co. v. Huffman,* 319 U.S. 293, the Supreme Court, through Justice Stone, stated on page 300:

". . . With due regard for these considerations, *it is the Court's duty to withhold such relief* when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. *In such a suit he may assert his Federal rights* and secure a review of them by this Court. This affords an adequate remedy to the taxpayer and at the same time leaves undisturbed the state's administration of its taxes . . ." (Emphasis added.)

Thus it appears that in the case at bar, even if plaintiff can assert some Federal right to a deduction which renders a part of the tax illegal, he must first pay this tax to the proper State officer, institute a suit for the recovery of such taxes paid under protest (injecting the Federal question in such suit), and if not satisfied with this State determination of his rights, apply to the Supreme Court for review.

In the same *Great Lakes v. Huffman* case (319 U.S. 293) the Court stated in closing on page 301:

". . . The judgment of dismissal below must therefore be affirmed, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment

should have been denied without consideration of the merits . . ." (Emphasis added.)

Appellant takes the view that somehow he is helped by *Hillsborough Township v. Cromwell,* 326 U.S. 620; he quotes (Brief, p. 32) from that decision a holding that there was "such uncertainty concerning the New Jersey remedy as to make it speculative whether the State affords full protection to the Federal rights." This statement was based on a long list of citations of New Jersey decisions indicating the absence of a state remedy; there are no such California decisions, but only decisions such as we have cited which support the comprehensiveness of the State remedies. In *Hillsborough* the party asserting an adquate State remedy had nothing but one decision of an inferior court to use as a springboard for the theory that this remedy existed.

In the case at bar, the speculation is wholly on the part of the party who controverts the adequacy of the remedy. Yet he cannot raise even a reasonable doubt; it is a mere possible or imaginary doubt, such as we warn our criminal juries against (*Penal Code,* Sec. 1096).

CONCLUSION.

Repeatedly, Appellant has characterized the tax as *valid* (Brief, pp. 3, 8, 9, 14, 21, 23, 27). If the tax is valid, Appellant has no cause of action in any court.

However if the National Housing Act, (Appellant's Brief, p. 2, N. 1) is applicable as Appellant

contends, the tax is invalid and illegal, because it exceeds "the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines . . ." If it is illegal, the various and certain California remedies for illegal taxation are unquestionably open to Appellant, because they are nowhere restricted to illegality arising under *State* law, and have always been broadly construed.

Appellant's position that the State remedies are not available because the tax is *valid,* and that the Federal Courts must enjoin the collection of the tax because it is *invalid,* is contradictory and absurd.

In any event, since the matter in litigation does not arise under Federal law, the Federal Courts lack jurisdiction.

The Orders of Judge Byrne should be affirmed.

Dated, San Bernardino, California,
August 18, 1958.

Respectfully submitted,

ALBERT E. WELLER,
County Counsel of the County of San Bernardino,

By J. B. LAWRENCE,
Deputy County Counsel of the County of San Bernardino,

Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

28 U.S.C. 1337
Commerce and anti-trust regulations.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. 1348
Banking association as party.

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

28 U.S.C. 1441
Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State

court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. 1651
Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

California Constitution, Art. XIII, Sec. 1
Property to be taxed.

All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided . . .

California Code of Civil Procedure
Sec. 462
Allegations not denied, when to be deemed true.

When to be deemed controverted.

Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counter claim, must, on the trial, be deemed controverted by the opposite party.

Sec. 1062
Cumulative remedy.

The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

Sec. 1086
Circumstances authorizing issuance; petition.

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

California Penal Code
Sec. 1096
Presumption of innocence; effect; reasonable doubt.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

No. 15991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARSH CALIFORNIA CORPORATION, a California corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

APPELLANT'S REPLY BRIEF.

HOLBROOK, TARR & O'NEILL,
W. SUMNER HOLBROOK, JR.,
FRANCIS H. O'NEILL,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellant.

FILED
SEP 18 1958
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Introductory statement 1

Summary of answers to appellees' misconceptions 5

I.

This suit is not an attack on state tax; it is one to establish a federally created offset or credit to a valid state tax 6

II.

Appellees misconceive appellant's federal "credit", or offset, to be only a "defense" to a state tax; actually, the credit arises from an independent source, which, if pleaded, requires under California practice separate counterclaim or cross-complaint 7

III.

This suit is not one to enjoin collection of a state tax, and therefore not within purview of Johnson Act; in any event, no certain state remedy exists to bar federal jurisdiction 12

A. Suit by State; defensive matter pleaded 14

B. Declaratory relief 15

C. Cancellation proceedings 15

D. Payment under protest 15

E. Claim and suit 16

F. Extraordinary remedies 16

G. Subsequent State suit demonstrates lack of "plain" remedy open to appellant 18

IV.

Federal "credit" or offset has been acknowledged and allowed in other states 19

Conclusion 19

Appendix:

Acknowledgment of federal "credit" or offset in other states App. p. 1

TABLE OF AUTHORITIES CITED

Cases

PAGE

Bayshore Sanitary Dist. v. San Mateo, 48 Cal. App. 2d 337 15

Board of Supervisors v. Stanley, 105 U. S. 305 10

County of Los Angeles v. Riley, 20 Cal. 2d 652 15

Great Lakes Co. v. Hoffman, 319 U. S. 293 13

Hillsborough Township v. Cromwell, 326 U. S. 620 5, 13, 14, 17

Himmelman v. Spanagel, 39 Cal. 389 7

King County v. Seattle School Dist., 263 U. S. 361 11, 12

People v. Buellton Dev. Co., 58 Cal. App. 2d 178 15

Peyton v. Railway Express Co., 16 U. S. 350 11

Provident Savings v. Ford, 114 U. S. 635 11

Republic Pictures v. Security-First Nat'l Bank, 197 F. 2d 767 .. 11

Sanders v. Allen, 58 F. S. 417 10

Sioux City Bridge Co. v. Dakota County, Nebraska, 260 U. S. 441 17

Sunset Oil Co. v. State of California, 87 F. 2d 972 3, 14

Statutes

National Housing Act, Sec. 408 2, 3, 4, 6, 9, 10

Public Law 1020 2, 6

Revenue and Taxation Code, Sec. 2603 et seq. 16

Revenue and Taxation Code, Sec. 5096 et seq. 16

United States Code, Title 28, Sec. 1331 1, 8, 11, 13, 18

United States Code, Title 28, Sec. 1337 11

United States Code, Title 28, Sec. 1341 4, 6, 7, 12, 13, 19

United States Code, Title 28, Sec. 2201 4, 13, 18

Textbook

2 Witkin, California Procedure (1954), p. 1570 8, 18

No. 15991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARSH CALIFORNIA CORPORATION, a California corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

APPELLANT'S REPLY BRIEF.

Before making direct answer to contentions raised by appellees, a preliminary statement seems necessary to clarify actual issues before this Court.

Introductory Statement.

Contrary to the position taken by them in the court below, and to the findings of the Trial Judge based thereon, appellees now suggest that there is no basic Federal jurisdiction in the District Court in this matter under 28 U. S. C. 1331, because it does not involve a "controversy" arising "under the laws of the United States" (Appellees' Br. pp. 5-6).

On the same page, and immediately following the above, appellees inconsistently state:

> "We admit freely that in the collection of this tax a law of the United States will be invoked by the taxpayer."

Before the District Court, both appellant and appellees recognized that the actual "controversy" arose here out of a Congressional offset or "credit", provided by Section 408 of the National Housing Act, as amended in 1956 by Public Law 1020.

The particular Congressional purpose in amending Section 408 in 1956 is obvious. Local property taxes are, of course, levies imposed in return for governmental services rendered by a local taxing agency. Under the National Housing Act, and the Wherry Act leases adopted pursuant thereto, *most,* if not all, of these local governmental services were furnished in two ways:

1. *The lessee itself provided for installation and maintenance of streets, street lighting, sewers, rubbish and garbage disposal; police, fire protection, library and recreational facilities were furnished by the military service itself.*

2. *The remaining area of local governmental service was provision of schools and maintenance of schools for the children of military personnel.*

This, by separate statute, was paid to the local entity *directly* by the Federal Government as a *subsidy.*

If local government levied taxes on the lessee's interest in the military housing project, when Governmental services were furnished almost wholly at Federal expense or by *cash* subsidies from Congressional appropriations, there would be a *windfall* to local governments involved. Since payment of the local taxes would *increase* rents charged, the *basic* Congressional purpose would be hampered.

Section 408 was amended to provide an offset or "credit" against local taxes levied on the project when the value of the services rendered by the lessee or by the Federal Government had been determined.

In this case, the designee, Captain Hunter, limited his determination to the *direct cash subsidies only.*

Unfortunately, in Section 408, Congress did *not* provide a basis for its *administrative* enforcement. It apparently relied upon fairness of County officials, when the determination was itself made, to work out a means for its allowance. *The present situation was created by refusal of San Bernardino County to honor such determination.*

Appellant was thereupon compelled to take legal steps to fulfill its obligations to the United States.

It is apparent *there is no express statutory means of enforcement of the offset or "credit."* Under California law, Appellee Tax Collector is under a duty to require payment of local taxes, either in legal tender of the United States or in exceptional circumstances, by county warrants (Appellant's Op. Br. p. 14). Obviously, Section 408 does *not* fall within *either* category.

While the Board of Supervisors might, upon notice, by cancellation of the tax, have removed the duty of its collection from the Tax Collector, the San Bernardino Board of Supervisors, and its Counsel, saw fit *not* to do so. Appellees concede (Appellees' Br. p. 16) that if formal petition for cancellation had been made by Appellant, and refused, there would have been no statutory means available to it to compel such action.

Common law remedies of counterclaim, based upon such a credit or offset, are, under California law (as expressly held by this Court in *Sunset Oil Co. v. State*

of California, 87 F. 2d 972) barred unless there is an express consent to sue the State. No such consent has been claimed to exist; and none does.

Appellant's *only* means of complying with its duty imposed, by its landlord, the United States, was to apply to the District Court below for declaratory judgment as to the meaning of Section 408. If its rights, declared by such judgment, were then not recognized by the county officials, its enforcement could only be compelled by suitable injunctive relief in the court below.

It was therefore for declaration of an *independent* Federal right, arising out of the ". . . laws of the United States", that jurisdiction here initially vested in the court below.

That an "actual controversy", as to the meaning and effect of such Federal statute here exists is self-evident from a reading of Appellees' brief. The remedy sought of declaratory judgment was clearly authorized by 28 U. S. C. 2201.

It is evident that 28 U. S. C. 1341 (Johnson Act) has no relevancy to this proceeding. There is no attempt here to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax; but, rather, to establish and enforce, as a separate, distinct countervailing right thereto, the Congressionally declared offset or credit.

Significantly, in the court below, and in their present brief, Appellees do not point out any "plain" or "speedy", or "efficient remedy" so to do. The very most that can be said of their claims is that there is *some* possibility that statutory judicial proceedings *might* suffice. But the Supreme Court has long held that if there is *any* uncertainty as to the "adequacy of the remedy", the Federal Court *should not refuse,* by mistaken rule of comity, to exercise its statutory jurisdiction. Rather, it should ter-

minate the controversy and enforce the Federal rights involved. *Hillsborough Township v. Cromwell,* 326 U. S. 620 (1946) (discussed App. Op. Br. pp. 31-33).

Confusion of Appellees as to true issues before this Court seems to have arisen from two facts:

1. *Inability* to *distinguish between* a factual situation where, as here, a *Federal "credit" or offset* is to be enforced which relieves the holder of such "credit" from liability to pay an otherwise valid tax, and *contrary,* but *usual* situations, where *collection* of a tax *is sought to be prevented because of defect* (Federal in character), *inherent to the State tax proceeding;*

2. Failure to realize that since California has not provided, administratively or judicially in recent years for any State offset or "credit" which could be taken against a valid property tax, for obvious reasons the State statutory tax corrective procedure is lacking in any provision directly applicable here.

Summary of Answers to Appellees' Misconceptions.

Appellees' argument, to which we now turn, rests upon *three separate* although related, *misconceptions* namely:

(1) Appellees conceive Appellant's contention as being an attack upon the validity, at least at the collection stage, of a State tax.

Answer: We admit the right to collect the tax, but assert a "credit," under paramount Federal statute, against the same.

(2) Appellees *assume* Appellant is setting up a "defense," based upon Federal statute, to a State tax, for the purpose of enjoining its collection.

Answer: We actually seek to establish, by *independent* Federal statute, a "credit" or offset to an admitted

tax liability, that would, when recognized, excuse payment of any amount of taxes by this Appellant.

(3) Appellees, *assuming* that this is an action basically to enjoin, suspend, or restrain collection of a state tax, argue that, by reason of adequacy of state remedy, jurisdiction of the District Court was barred by 28 U. S. C. 1341 (Johnson Act).

Answer: This proceeding does *not* fall within the purview of Section 1341. At most, such section may be referred to as a statement of policy only, but not necessarily controlling upon the District Court in exercising jurisdiction. Since Appellees cannot, and do not, assert any "plain, speedy or efficient" remedy open to Appellant, there is no justification here for the trial Court to refrain from exercising its clear jurisdiction.

I.

This Suit Is Not an Attack on State Tax; It Is One to Establish a Federally Created Offset or Credit to a Valid State Tax.

By concession of both parties on this appeal, this Court has only one basic question submitted to it: Did the District Court have jurisdiction to entertain Appellant's suit?

Thus, Appellant concedes the entire validity of the County tax on its "possessory interest", under both state and Federal Constitutions and statute (App. Br. p. 10).

Appellees concede "for the sake of this argument only," that the Congressional Amendment in 1956 to Section 408 of the National Housing Act by Public Law 1020, creating a "credit" or "offset" is "valid".

This follows because Appellees expressly concede, for such limited purpose, that the determination constitutes

a valid defense[1] to "any" liability Appellant would otherwise have for payment to the County of "any" tax.

Although the entire validity of Appellant's "credit" or offset to the claimed tax is conceded by Appellees, they, nevertheless, erroneously assume that this suit is, itself, an attack on a state tax proceeding.

Suffice it to quote the California Supreme Court in *Himmelman v. Spanagel,* 39 Cal. 389, 393, when it stated:

> "The origin, obligatory force and whole nature of a tax is such that it is impossible to conceive of a demand that might be set off against it, unless expressly so authorized by statute." (Our italics.)

Although Appellees concede on this appeal the "validity" of the Federal credit in all respects, they, nevertheless, have refused to give effect thereto. It thus would be most difficult to find a clearer case of "actual controversy within its jurisdiction" of a Federal District Court. By reason thereof, it would seem clear that in this case, it had obvious jurisdiction under Title 28 U. S. C. 2201,

II.

Appellees Misconceive Appellant's Federal "Credit", or Offset, to Be Only a "Defense" to a State Tax; Actually, the Credit Arises From an Independent Source, Which, if Pleaded, Requires Under California Practice Separate Counterclaim or Cross-Complaint.

Appellees' *second* misconception follows from their first. Still *assuming* that this is an *attack* upon *collection* of a state tax, they argue that Appellant's "credit" or offset is only a "defense". At pages 4-12 of their brief, they further assert that a "defense", even though based on a Federal statute, does not bring this case within

[1]As discussed under Point 2, the use by Appellees of the word "defense" discloses a second misconception by them.

primary jurisdiction of the District Court under 28 U. S. C. 1331. This was not, of course, Appellees' position in the court below.[2]

Appellees seem to concede that if the "matter in controversy" be the Federal statutory "credit" or offset, then their contention as to a lack of primary Federal jurisdiction is unsound.

We have previously pointed out (*supra,* p. 6) the factual concessions made by *both* parties in this case, *i. e.,* that the state tax and Captain Hunter's determination of the Federal "credit" thereto, are *both valid.* Yet San Bernardino County refuses to honor the latter. *Just what is the controversy, unless it be such credit?*

Appellees' contention (based on the assumption that the "credit" or offset is only a "defense") is further *procedurally* unsound in view of California procedure requirements.

In Witkin, *California Procedure* (1954), Vol. 2, at page 1570, the writer states:

> "A cross-complaint is a separate pleading, and a counterclaim, though part of the answer, is separately stated. *Either is based upon an independent cause of action, prays for the relief sought, and must be set forth with the same completeness and sufficiency of allegations as a complaint on such a cause of action.* (See *Asamen v. Thompson* (1942), 55 C. A. 2d 661, 674, 131 P. 2d 841 [cross-complaint]; *People v. Buellton Dev. Co.* (1943), 58 C. A. 2d 178, 184, 136 P. 2d 793 [*cross-complaint does not*

[2]Although the trial judge at the first hearing below suggested that the basic Federal jurisdiction be briefed for him on the second hearing, appellees' counsel at the second hearing stated:

> ". . . I am not, myself, convinced that this case does not sufficiently involve federal law to fit that clause of Section 1331, although it could be viewed, and we have these cases to indicate it, that the State tax is the primary cause and the substance of the action. But I do not wish to lean on that point, and that is the reason we did not argue it in the first place." [Rep. Tr. p. 33.] This is consistent with Appellees' statement (p. 4).

lie against state if based on cause as to which state has not consented to be sued]; Clark, p. 639; 10 So. Cal. L. Rev. 433.)" (Our italics.)

Distinguishing such matter from purely *defensive* material, the writer continues:

"Essentially an affirmative defense *attacks the plaintiff's claim* by setting up such matters as fraud, estoppel, excuse for nonperformance, accord and satisfaction, etc. A counterclaim or cross-complaint does not attack the plaintiff's claim but asserts an independent cause of action of the defendant to *defeat the plaintiff's ultimate recovery by an offset,* or to *obtain an affirmative judgment for the excess . . .*"

Thus, contrary to Appellees' contentions, Appellant could *not* defend on the provisions of Section 408 of the National Housing Act against the state tax asserted by the County—*unless it set up its "credit" or offset by appropriate counterclaim.*

This is actually sufficient answer to argument and citations made by Appellees, at pages 4-10 of their brief. A brief survey, however, of certain of the citations relied upon may be of aid to this court.

First, it has never been Appellant's contention that the primary jurisdiction of the District Court is broadened or extended simply by use of one of the remedies permitted to said court. The matter contained at page 5 of Appellees' brief is not concerned with any argument or issue in this case.

The same is true of citations appearing on pages 7 and 8. As we have already pointed out, the "credit" or offset arises solely by Federal law, is *not* defensive in character, and is matter which must be *separately* pleaded.

Again, the cases cited at pages 11-12, for the proposition that a "Federal-law defense does not create Fed-

eral jurisdiction" (regardless of how sound they are generally) are not applicable to the situation here involved.

Two cases, however, may warrant a little more discussion. *Board of Supervisors v. Stanley,* 105 U. S. 305, concerned a state tax levy on national bank shares. The Federal statute permitting such taxation of a Federal instrumentality, then and now, consented to such tax only on the basis of *equal* treatment with *other* intangibles under state law.

State law required a deduction for debts owing by shareholders taxed on their intangible personal property. The taxpayer contended that a similar offset was not allowed by the state statute taxing the national bank shares. The Supreme Court simply held that if, on a showing that the state officials were not granting such required equal treatment to national bank shares, the state "assessment" would become "erroneous" and, on such ground, could be defended against in the state courts.

None of this is applicable to the facts here. All that Appellant claims is a federally created statutory "credit" against a valid State tax.

For the proposition that a Federal statute will not be construed to enlarge Federal jurisdiction, without a distinct manifestation of that Congressional intention, Appellees cite *Sanders v. Allen,* 58 F. S. 417, 420.

In that case, plaintiff sought Federal jurisdiction of a simple tort action, brought by a tenant against her landlord for "continued irritating conduct." Apparently this conduct had been motivated by a desire to force the tenant to leave the premises, and rid the landlord from the Emergency Price Control Act.

As Judge O'Connor pointed out, page 21, the facts of the complaint "if established, would make out an action

in tort . . . triable in the state courts *without any reference to the Federal statute referred to in the complaint.*"

The legal statement in Appellees' Brief (p. 9) refers only to a *dictum* in the case. Even if it were not, it would have nothing to do with issues before this Court.[3]

As to authorities previously cited by us, we are willing to submit Appellees' comments thereon (pp. 10-11) without further reply other than to refer this Court to comments previously made by us at pages 11-14 of Appellant's Brief.

Two obvious misunderstanding of true issues here presented, on the part of Appellees, however need additional notice. They comment on *Peyton v. Railway Express Co.*, 16 U. S. 350 (App. Op. Br. p. 12), as being under the predecessor section to 28 U. S. C. 1337, and that this section, unlike Section 1331, "lacks the 'matter in controversy' requirement."

Turning to 1331, we find that the full text is the limitation on Federal jurisdiction to those cases "where the *matter in controversy* exceeds the sum or value of $3000." The *source of jurisdiction* is found in the following phrase "arises under the Constitution, Laws or Treaties of the United States."

Again, Appellees properly concede that in *King County v. Seattle School Dist.*, 263 U. S. 361 (quoted App. Op.

[3]So that this court will not believe that the short treatment given Appellees' authorities arises from lack of knowledge of their contents, or a desire to avoid specific discussion, we point out here additional inapplicability to the present issues.

Thus, in reference to the cases on page 8 of Appellees' Brief, beginning with *Republic Pictures v. Security First Nat'l Bank*, 197 Fed. 2d 767, and again, lower on the page, *Provident Savings v. Ford*, 114 U. S. 635, a reading thereof will disclose to the Court that all these decisions hold is that the Federal question must *arise out* of the *plaintiff's complaint* and as a *foundation* of *its cause of action*, and *not* simply *appear* therein *as anticipation of a defense* which would be raised thereto.

Br. p. 11), "plaintiff's primary right was Federal" to receive the moneys due it under the subsidy statute. Further comment that in this case "Harsh's primary right to his money is not based on an Act of Congress; it is simply Harsh's money, collected in the ordinary course of business," is a complete *non sequitur*.

Actually, as the plaintiff in the *King County Case* sought to enforce its right under Federal statute to subsidy money, so Appellant, in this case, seeks to enforce its right under the Federal statute, because of prior Federal subsidy payments, to subsidy "credit".

III.

This Suit Is Not One to Enjoin Collection of a State Tax, and Therefore Not Within Purview of Johnson Act; in Any Event, No Certain State Remedy Exists to Bar Federal Jurisdiction.

Appellees' argument in this regard is in two sections of their brief. The substantive argument appears at pages 25-30. The balance appears at pages 12-25. We will take up Appellees' contentions in reverse order.

Appellees admit, at page 26, that the first question posed under 28 U. S. C. 1341 is whether the instant action is "one to enjoin, suspend or restrain the assessment, levy or collection of a California tax".

By reference to the caption of the complaint, Appellees contend that Appellant is inconsistent in urging in this court that the suit in question is one for declaratory judgment, and not one falling within the purview of injunctive proceedings conditionally barred by the Johnson Act. This statement is, of course, not true.[4]

[4]The Reporter's Transcript shows that appellant's opening statement in the District Court, was as follows:

"Mr. Holbrook: There is no contention here made by the plaintiff that the San Bernardino County tax is invalid *per se*.

As earlier discussed (App. Op. Br. p. 31), the controlling decisions in this respect are *Hillsborough Township v. Cromwell,* 326 U. S. 620, and the earlier decision in *Great Lakes Co. v. Hoffman,* 319 U. S. 293,

Perhaps it is only a technical difference, but, as there pointed out by the Supreme Court, the Johnson Act is a *legislative* pronouncement of an equitable and *judicial* rule long followed before its enactment by the Federal Courts.

Summarized, therefore, the *correct* proposition is contrary to the finding of the trial court. This proceeding *is not and could not* be barred by 28 U. S. C. 1341 because said section is not applicable to its subject matter.

On the other hand, if there is a "plain", "speedy", *and* "efficient" remedy existing in the state courts, it would be eminently proper for the District Court to refrain from exercising its jurisdiction under Section 1331, and the use of the remedy of declaratory judgment under 28 U. S. C. 2201.

This brings us to the second branch of the controlling *Hillsborough Case.* It is not enough to suggest that a remedy does lie, even if a court of the state has so held,

In other words, other than for the 1956 amendment, there is no question, so far as this proceeding is concerned—there may be a defect that we are not raising at this time—that the obligation represented by the tax bill, attached to the complaint is due and payable.

"Now, for certain reasons to prevent unjust enrichment, Congress has provided an offset to that. Now, there is no provision in California law for an offset without an express statute so to do. There is no express statute in California so doing, for administrative purposes or for court action. The normal remedies of injunction, mandate and prohibition—not prohibition—certiorari, being agreed between the parties not to be available, it is our contention that to enforce this new right created by the 1956 Congressional Act, it is necessary to come to this court, because there is no remedy in the state courts of any kind at all. Now, that's my statement in a nutshell, Your Honor." [Rep. Tr. pp. 14-15.]

if there seems to be conflict of that decision with other state decisions.[5]

As was concluded therein, when there is "such uncertainty surrounding the adequacy of state remedy" this will "justify the District Court in retaining jurisdiction of the case"—even when, in that case, the District Court was able to decide the question solely on state law.

In this case, mere *assumption* by the trial judge that a remedy must or ought to exist in the state court, or mere *general* statement by counsel to such effect, without precise application, is not sufficient to warrant the District Court in refraining from exercising its jurisdiction.

We turn to *seriatim* consideration of California remedies claimed to be "available" by Appellees in their brief (pp. 12-22).

A. *Suit by State; Defensive Matter Pleaded.*

Appellees first suggest (p. 13) that the County could, as it has done since this suit was filed, bring a suit in which "of course it must prove the tax is valid and due, and the defendant may set up *invalidity* as a defense."

Appellant's claim arises out of an independently created "credit" or offset. As previously demonstrated, it could not set up the same by answer; it would have to be pleaded as a "counterclaim". This would constitute an *unauthorized* suit against the State.

This Court, in *Sunset Oil Co. v. State of California,* 87 F. 2d 972, well summarized the California cases, and in that case, held that consent to suit had *not* been granted by the State, even as to a valid statutory offset which, should have been (but was not) administratively employed.

[5]See discussion of factual situation as to remedy under New Jersey law before the Supreme Court in the *Hillsborough Case,* discussed in Appellant's Op. Br. pp. 31-32.

Appellees are careful not to discuss this Court's prior decision, largely controlling in this case. They content themselves with the suggestion that it is only "secondary authority". They cite no California case contrary thereto, either prior in date or subsequent thereto. None exist.[6]

B. *Declaratory Relief.*

It is unquestioned that declaratory relief statute in California, as in the Federal courts, is a remedial not a substantive section. Its jurisdiction only vests as to matters otherwise justiciable in the California courts. Unless, therefore, there is *express* authority somewhere by California statute, specifically, to sue the state and its entities, to establish the Federal offset or "credit" here involved, declaratory relief is not an available remedy.

C. *Cancellation Proceedings.*

Appellees frankly agree with us that cancellation is not an available remedy (p. 16).

D. *Payment Under Protest.*

Appellees' entire argument as to this "remedy" is predicated upon its *erroneous assumption* that the "credit" or offset renders the tax *"void* or *illegal"*. Unless it does so, the section is conceded to be wholly inapplicable.

As pointed out above, the Federal "credit" or offset is *predicated* upon the assumption that it will be applied to a valid tax.

[6]For California cases to same effect, subsequent to 1937, date of this Court's decision, see:

County of Los Angeles v. Riley, 20 Cal. 2d 652 (1942);
People v. Buellton Dev. Co., 58 Cal. App. 2d 178 (1943);
Bayshore Sanitary Dist. v. San Mateo, 48 Cal. App. 2d 337 (1941).

E. *Claim and Suit.*

Appellees further contend (p. 19) that since the tax itself may be valid, but its "collection" invalid, Appellant could file its claim under Revenue and Taxation Code Section 5096, *et seq.,* and, if denied, sue for its recovery.

But, the premise of Appellant's case here is that since the tax itself was valid until an *affirmative* duty by *judgment* of the District Court had been placed upon the Appellee Tax Collector, his collection would *not* be *illegal.*

Under California law, he *must* collect the tax in *legal tender* of the United States, or, exceptionally, by use of County warrants, *supra* (p. 3), and *no other means of "payment" are recognized.*

Until Appellee Tax Collector is *relieved* by some legal action of the amount of dollars and cents charged to him by the auditor when he accepted the roll for collection, he is *responsible* under California law for payment of the money to the County Treasurer or to return it as "delinquent" on the "delinquent roll" as unpaid taxes (Rev. and Tax. Code Sec. 2603, *et seq.*).

We know of only *two* ways in which the cloud of Appellee County's tax on Appellant's "possessory interest" and the duty of Appellee Tax Collector to collect the same, can be removed. These are:

1. *Voluntary action* by Appellee Board of Supervisors through cancellation of the tax.

2. By *judgment of this Court,* declaring the offset to defeat the Appellee Tax Collector's "ultimate recovery."

F. *Extraordinary Remedies.*

As to *mandamus, certiorari* and injunction, Appellees expressly concede that such "are not available" (p. 22).

Appellees contend that this result is because the California courts have always held that statutory remedies

are adequate, and therefore these extraordinary remedies should *not* lie.

Granted that such is the case, it has never been held that Federal jurisdiction rests upon a state court determination that its remedy is adequate *if, in fact, it is not.*

Our situation is analogous to that presented to the Supreme Court in *Hillsborough Township v. Cromwell,* 326 U. S. 620 (quoted App. Op. Br. pp. 31-32). New Jersey assessing authorities had discriminated between taxpayers of the *same class* by assessing property of a *single* taxpayer at the *full* statutory rate, but illegally exempted *all other* similar *property.*

The Federal right to *"equal* treatment" under such circumstances had been long established by *Sioux City Bridge Co. v. Dakota County, Nebraska,* 260 U. S. 441, 445-447. New Jersey, of course, recognized *existence* of such Federal right, but had long held that the wronged taxpayer's *only remedy* was to compel *proper* assessment of the privileged or exempted property, not by *reduction* of the tax on the *discriminated* property.

In the *Sioux City Bridge Case,* a similar holding by the Nebraska Court had been held by the Supreme Court to be an *inadequate* remedy. For such reason, the Supreme Court had given *direct* Federal relief, by ordering the wronged taxpayer's "assessment" to be reduced to the same percentage of value at which others were taxed.

In the *Hillsborough Case,* the Township argued that a fairly recent New Jersey decision had indicated state adoption of the Federal remedy. It appeared, however, that subsequently, in another decision written by the same Judge, doubt was thrown on this remedy.

Under such circumstances, the Supreme Court, *disregarding the New Jersey court's view of adequacy,* held the remedy in New Jersey to be "inadequate", and that

there was sufficient "uncertainty" as to the remedy to justify the District Court retaining jurisdiction under 28 U. S. C. 1331, and proceeding to render a declaratory judgment under 28 U. S. C. 2201.

G. *Subsequent State Suit Demonstrates Lack of "Plain" Remedy Open to Appellant.*

The real proof of the pudding here is what actually happened in the subsequent suit brought by San Bernardino County to collect its tax.

This suit alleged nothing as to the Federally determined "credit" or offset. Appellant answered generally, admitting the levy, denying its validity in part only on state grounds (which have been expressly not urged in this proceeding) and improperly set up (Witken, *California Procedure, supra,* p. 8) the Federal "credit" or offset.

It then *properly, under the same authority, by cross-complaint,* alleged *affirmatively* the "credit" exceeded the entire amount of the claimed taxes; alleged the duty of the County officials under such "credit"; *and prayed for declaration of such right and injunction against the County from enforcing any tax less or equal to the amount of such "credit" or offset.*

The United States petitioned to intervene, setting up the "credit" and offset, alleging itself to be the real party in interest, and seeking similar relief.

On motion of Appellee County, the intervention was denied, and Appellant's cross-complaint was stricken *without leave to amend.*

In such subsequent state action, the situation thus stands that the real party of interest, the United States, has not been permitted to intervene; the only proper pleading setting up the Federal "credit" and offset has been stricken and, at best, appellant has been left with a doubtful answer under California procedure.

IV.

Federal "Credit" or Offset Has Been Acknowledged and Allowed in Other States.

Although perhaps not necessary to the discussion on this appeal, it may well be of interest to this Court that the questions precipitated herein, by the refusal of San Bernardino County voluntarily to accede to the determination of the Federal "credit" or offset, have not been raised in most states, but the Federal "credit" or offset has been recognized and allowed. For summary of situations elsewhere see appendix.

Conclusion.

From the foregoing, it is respectfully submitted that there is no question as to the primary Federal jurisdiction herein. The only matter in controversy between the parties is the Federally created "credit" or offset to an otherwise valid state tax, "arising out" of the provisions of Section 408 of the National Housing Act.

Judgment of dismissal below was erroneously rendered, because of the mistaken view of the Trial Judge that this was an action to enjoin the collection of a state tax, which it is not. Therefore, he thought it fell within the purview of 28 U. S. C. 1341 (Johnson Act). His further *assumption* that the matter could be presented by *some* remedy open to Appellant in the state courts, was likewise erroneous since, to bar jurisdiction of the District Court, there must be "certainty" as to the existence of a "plain", "speedy" and "efficient" remedy under state law.

Appellees have not even attempted to point out any *specific* remedy available to Appellant. We have demonstrated that there is none.

The judgment of dismissal by the Trial Court should be reversed, with instructions to the Trial Court to permit Appellees to file such answer or other pleadings as they desire on the merits.

Respectfully submitted,

HOLBROOK, TARR & O'NEILL,

W. SUMNER HOLBROOK, JR.,

FRANCIS H. O'NEILL,

Attorneys for Appellant.

APPENDIX.

Acknowledgment of Federal "Credit" or Offset in Other States.

On April 9, 1958, thus the Attorney General of Alabama ruled, as to a "Wherry Housing Project" in Calhoun County, that the offset provided by Section 408 of the National Housing Act should be recognized by the Calhoun County authorities. Since the Congressional act was lacking in explicit machinery, he held that its direct application was "an administrative matter" to be worked out between the Secretary of Defense, his designee, the lessee and the local taxing authorities.

On May 27, 1957, the Attorney General of the State of Wyoming rendered his opinion concerning the effect of the Federal "credit" or offset on the 1957 tax at Warren Air Force Base. After pointing out that the local officials had stated that the *maximum* tax which they could impose upon the project would be *about $50,000.00,* and that the *"Federal Contribution* to the area" *amounted* to *$50,000.00 to $60,000.00,* the Attorney General advised *"as a practical matter",* that *"no attempt should be made to tax the Wherry Housing Project."*

In Utah, we are informed that the Davis County Commissioners adjusted their tax to allow for the Federally created "credit" or offset for both tax years 1956 and 1957.

In only one instance in the State of Washington, to our knowledge, has objection judicially been made to the Federal "credit." This arose in connection with a condemnation proceeding brought by the Government to take over two Wherry Projects. In connection therewith, an attempt was made by local authorities to secure payment of their taxes, without allowance for the Fed-

erally created "credit" and offset. The matter came on for hearing before District Judge Driver in the District Court for the Eastern Division of Washington, Northern Division. The Federal "credit" and offset was sustained.

We are informed that an appeal has been taken but not yet perfected to this Court from such ruling by the State taxing authority.

The Department of Justice (Washington) also reports (although we have not seen the records involved) that Jackson County, Kansas, is resisting a Federal "credit" in the State Court, and a dispute as to a similar "credit" exists with a Florida County and a Massachusetts town but the last two have not proceeded to the judicial stage.

No. 15993

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

FILED

MAY 22 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—5-16-58

No. 15993

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—5-16-58

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit in Support of Plaintiff's Motion for Summary Judgment 30

Answer to Complaint, Cause No. 658447, Superior Court 35

Answer 18

Attorneys, Names and Addresses of..... 1

Certificate by Clerk..... 56

Findings of Fact and Conclusions of Law on Motion for Summary Judgment, Proposed by Plaintiff 45

Findings of Fact and Conclusions of Law, Proposed by Defendant 49

Judgment 53

Minutes of the Court February 17, 1958..... 39

Motion for Summary Judgment, Defendants'.. 22

Notice of 21

Motion for Summary Judgment, Plaintiff's.... 24

Notice of 24

Notice of Appeal 55

INDEX PAGE

Notice of Filing of Petition for Removal..... 17

Petition for Removal of Cause to U. S. District Court 3

Complaint, Cause No. 682787, Superior Court 9

Exhibit A—Insurance Policy No. D 11 52238 12

Summons, Cause No. 682787, Superior Court 7

Plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law After Motion for Summary Judgment 40

Plaintiff's Opposition to Defendant's Proposed Findings of Fact and Conclusions of Law.... 37

Statement of Points to Be Relied Upon on Appeal and Designation of Record 59

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM H. BRAWNER,
ERNEST W. PITNEY,
639 So. Spring Street,
Los Angeles 14, California.

For Appellee:

McBAIN & MORGAN,
ANGUS C. McBAIN,
639 So. Spring Street,
Los Angeles 14, California.

In the District Court of the United States for the Southern District of California, Central Division

No. 989-57 HW

GERTRUDE L. BRAWNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a Corporation; JOHN DOE, RICHARD ROE, DOE ONE TO TWENTY, Inclusive; BLACK & WHITE COMPANY, a Corporation,

Defendants.

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT

To the Honorable, the District Court of the United States, for the Southern District of California, Central Division:

The petition of defendant, Pearl Assurance Company, Limited, a corporation, respectfully shows:

I.

That the above-entitled cause is a suit of a civil nature at law over which the District Court of the United States has original jurisdiction, and that said action has been commenced and is now pending in the Superior Court of the State of California, in and for the County of Los Angeles.

II.

That the plaintiff, Gertrude L. Brawner, was at the time [2*] of the commencement of the foregoing action and ever since has been and is now a citizen and resident of the State of California, residing in Los Angeles County therein.

III.

That defendant, Pearl Assurance Company, Limited, a corporation, was at the time of the commencement of the foregoing action and ever since has been and is now a corporation, duly organized and existing under the laws of England in the Kingdom of Great Britain, with its principal place of business in the City of London, England, and is, was and has been at all times a citizen, resident and subject of England and a non-resident of the State of California.

IV.

That the above-entitled action has not been tried nor has the time allowed the defendant, Pearl Assurance Company, Limited, by the laws of the United States or of the State of California, or by the rules of this Court, in which to answer or plead to the complaint of plaintiff, or otherwise, expired, and that your petitioner has not yet appeared in this action.

V.

That the cause of action attempted to be alleged

*Page numbering appearing at foot of page of original Certified Transcript of Record.

against this petitioning defendant in the complaint filed by the plaintiff involves a controversy which is wholly between citizens of different states, to wit, between plaintiff, a citizen and resident of the State of California, and this petitioning defendant, a citizen and resident of England in the Kingdom of Great Britain; that the plaintiff sues this petitioning defendant upon a policy of insurance and prays judgment in the total sum of $7,650.00, with interest at 7% per annum from March 5, 1957. That the amount in dispute or controversy in said action as between plaintiff and this petitioning defendant exceeds, exclusive of interest and costs, the sum and value of $3,000.00; that this petitioning defendant disputes said claim and demand and will defend the same. [3]

VI.

That the foregoing cause was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, on July 10, 1957, by the plaintiff filing with the Clerk of said court a complaint in said action and causing summons to be issued directed to this petitioning defendant and to the fictitious defendants; that to the knowledge of petitioner no defendant other than this petitioning defendant has been served; that plaintiff caused a copy of the initial pleading herein, to wit, the complaint and of the summons thereon to be served on petitioner on July 26, 1957, by delivery on said date to its office in the City and County of San

Francisco, State of California, of a copy of said summons and complaint.

VII.

That the foregoing cause involves a separable controversy wholly and solely between the plaintiff and this petitioning defendant, who are the only indispensable or necessary parties thereto; that the fictitiously named defendants are mere nominal parties, having no interest in said controversy and against whom no cause of action has been alleged or attempted to be alleged by plaintiff.

VIII.

That your petitioner herewith presents and files a bond with good and sufficient surety, conditioned that this defendant will pay all costs and disbursements incurred by reason of the removal proceedings if it be determined that the cause was not removable or was improperly removed, and also files herewith a copy of all processes and pleadings served upon it and contained in the aforesaid Superior Court file.

IX.

That your petitioner desires said action be removed from the Superior Court of the State of California, in and for the County of Los Angeles, into the District Court of the United States, for [4] the Southern District of California, Central Division, and prays that the aforesaid bond be approved and accepted and that said cause be removed.

Dated this 13th day of August, 1957.

PEARL ASSURANCE COMPANY, LIMITED, A CORPORATION,

By /s/ ANGUS C. McBAIN,
Attorney for Said Petitioner.

Duly verified. [5]

In the Superior Court of the State of California in and for the County of Los Angeles

No. 682787

GERTRUDE L. BRAWNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a Corporation; JOHN DOE, RICHARD ROE, DOE ONE TO TWENTY, Inclusive; BLACK & WHITE COMPANY, a Corporation,

Defendants.

SUMMONS

The People of the State of California Send Greetings to:

Pearl Assurance Company, Limited, a Corporation; John Doe, Richard Roe, Doe One to Twenty, Inclusive; Black & White Company, a Corporation, Defendants.

You are directed to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any further relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 10th day of July, 1957.

[Seal] HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles;

By /s/ A. H. AVERY,
Deputy. [7]

In the Superior Court of the State of California in and for the County of Los Angeles

No. 682787

GERTRUDE L. BRAWNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a Corporation; JOHN DOE, RICHARD ROE, DOE ONE TO TWENTY, Inclusive; BLACK & WHITE COMPANY, a Corporation,

Defendants.

COMPLAINT FOR RECOVERY FOR FIRE UNDER POLICY OF INSURANCE ISSUED TO PLAINTIFF

Plaintiff complains of defendants and states:

I.

That defendants John Doe, Richard Roe, Doe One to Twenty, inclusive; Black & White Company, a corporation, are sued herein by their fictitious names; their true names and capacities are unknown to plaintiff at this time and plaintiff will ask leave of court to amend its complaint and insert their true names and capacities when same are ascertained.

II.

On the 22nd day of October, 1955, defendant Pearl Assurance Company, Limited, a corporation, for a

consideration, issued to plaintiff its policy of insurance No. D 11 52238, a copy of which is attached hereto marked Exhibit "A" for identification and made a part hereof as though set forth herein in full. Thereafter, [8] from time to time, for a consideration, defendant continued said policy in full force and effect up to and including the 22nd day of October, 1958, agreeing to pay for loss by fire to the limit thereof, to wit, the sum of $7,500.00, together with loss of rental and other covenants as in said policy set forth.

III.

On or about the 4th day of February, 1957, plaintiff was the owner of those certain premises known 125-127-127½ South Bunker Hill Avenue, Los Angeles, California, on which date said property was totally destroyed by fire.

IV.

That prior to the filing hereof, to wit, on or about the 5th day of February, 1957, plaintiff duly reported said loss to said defendant and demanded that they pay said loss as provided in said policy but defendants have failed and refused and now fail and refuse to pay said loss or any part thereof, and there is now due, owing and unpaid to plaintiff from defendants the sum of $7,500.00, together with interest thereon at the rate of 7% per annum from the 5th day of March, 1957, until paid, together with loss of rentals in the sum of $150.00.

V.

The loss sustained by plaintiff is covered under the terms of said policy of insurance.

Wherefore, plaintiff demands judgment against defendants in the sum of $7,500.00, together with interest thereon at the rate of 7% per annum from the 5th day of March, 1957, until paid, together with the sum of $150.00 loss of rentals, and for costs of suit herein incurred.

Dated: This 8th day of July, 1957.

/s/ WILLIAM H. BRAWNER,
Attorney for Plaintiff.

Duly verified [9]

EXHIBIT A

STANDARD FORMS BUREAU FORM 16-A (JAN. 1948)

ASSIGNMENT (PROVISIONAL) OF POLICY
(ACTUAL SALE AND TRANSFER OF PROPERTY)

GERTRUDE L. BRAWNER, a married woman

whose address is (hereinafter termed "Transferee") is hereby recognized as the insured under the below-numbered policy in place and stead of

W. H. BRAWNER, a married man

subject to all the terms and conditions of said policy.

THE TRANSFEREE BY ACCEPTANCE OF THIS ENDORSEMENT WARRANTS AND AGREES:

(A) THAT THE TRANSFEREE HAS OBTAINED TITLE TO THE PROPERTY DESCRIBED IN AND INSURED UNDER SAID POLICY; AND

(B) THAT THE TRANSFEREE WILL, UPON DEMAND, PAY TO THE COMPANY BELOW-NAMED ALL PREMIUMS UNDER SAID POLICY NOW DUE OR WHICH MAY HEREAFTER BECOME DUE.

Attached to Policy No. 11 52238 of the PEARL ASSURANCE CO.
NAME OF COMPANY

Issued to W. H. BRAWNER

Agency at LOS ANGELES, CALIF. Dated 11-3-55

TRADE MARK STANDARD REG. U.S. PAT. OFF. 16-A JAN. 1948

11-9-55 at

LANKERSHIM CENTER COMPANY

BY D. C. Wright Agent

GENERAL CHANGE ENDORSEMENT

General Liability or Compensation			Automobile			
Additional Premium $ / Return Premium $			Return Premium $		Additional Premium $	
Cov.	Cov.	Cov.	A	F	A	F
—$			C	G	C	G
v. —$			B	H	B	H
iv. —$			D	I	D	I
			E	J	E	J

7-48

End. No.

It is agreed that item # 1 of the policy declarations is amended to read:

Gertrude L. Brawner

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of the policy or any endorsement attached thereto, except as herein set forth.

This endorsement shall become effective November 3, 1955 at 12:01 A. M., but shall not be valid until countersigned by a duly authorized representative of the company.

Attached to and forming part of policy No. LSO 369009 of the NEW AMSTERDAM CASUALTY COMPANY, issued to W.H. Brawner

11-8-55 ZK

Countersigned by LANKERSHIM CENTER COMPANY

BY D. C. Wright Authorized Representative

2201-B-100 180m-7-48

J. S. Mahon President

Secretary

1-

Form Standard Form Fire Insurance Policy
DWELLING FORM

STOCK COMPANY

PACIFIC DEPARTMENT

ESTABLISHED 1864

PEARL

INCORPORATED IN ENGLAND
HEAD OFFICE IN THE UNITED STATES
10 RECTOR ST., NEW YORK CITY

No. D 11 52238

Agency LOS ANGELES

Replacing No 939253

SAN FRANCISCO CALIFORNIA

Expires OCTOBER 22, 1958

Named Insured
W. H. BRAWNER

Location
LOS ANGELES, CALIF.

Lankershim Center Company
INSURANCE
PHONE RI 7 6528

AND
NING $ 7500.00
ENDED COVERAGE

RATE	.25	PREMIUM $	18.75
RATE	.10	PREMIUM $	7.50
RATE		PREMIUM $	
RATE		PREMIUM $	
		TOTAL PREMIUM $	26.25

INSURANCE UNDER "OTHER PERILS AND COVERAGES" ATTACHES ONLY FOR SPECIFIED PERILS OR COVERAGES AS TO WHICH (A) RATE AND PREMIUM ARE SHOWN IN THE SPACES TO THE RIGHT OF THE DESIGNATION OF SUCH PERIL OR COVERAGE AND (B) WRITTEN EN DORSEMENT IN REFERENCE THERETO IS MADE A PART OF THIS POLICY

Consideration of the Provisions and Stipulations Herein or Added Hereto and of the Above Specified Dollars Premium this Company,
a term of THREE YEARS from OCTOBER 22, 1955 at noon, } Standard Time,
to OCTOBER 22, 1958 at noon, }

ation of property involved, to an amount not exceeding the above specified dollars, does Insure

W. H. BRAWNER, A MARRIED MAN

egal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it l cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance ny increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compen- n for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HERE- ER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each r place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not here.

ated:

125-127-127½ SOUTH BUNKER HILL AVENUE
LOS ANGELES, CALIFORNIA

*Item I. $	7500.00	ON the	COMP.	roof	FRAME	building, containing		family unit(s)
			ROOF COVERING		CONSTRUCTION		NUMBER	
*Item II. $	NIL	ON household furniture and personal property.						
*Item III. $		ON the		roof		building		
			ROOF COVERING		CONSTRUCTION			
						DESCRIBE		
*Item IV. $	NIL	ON trees, shrubs, and plants.						
*Item V. $	X	ON rental value.						
*Item VI. $	NIL	ON additional living expense.						
*Item VII. $		ON						
						DESCRIBE		

, State of California

ance attaches hereunder only to those Items for which an amount is shown in the space provided therefor and for not exceeding said amount under such item, and subject to the s) and endorsement(s) attached.

FOR COMPANY INFORMATION

e No.(s) SF 184NS 7-55 attached.

INSERT FORM NUMBER(S) AND EDITION DATE(S)

ion, if any, shall be adjusted with the Insured specifically named, unless otherwise specified by, (a) written agreement, or (b) endorsement hereon. Subject to all the terms and c of this policy and to the written agreement, if any, between this Insurer and the following named Payee(s) loss if any, under Item I and Items shall be

e to ASSURED

WHOSE MAILING ADDRESS IS

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made rt of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided herein.

LANKERSHIM CENTER COMPANY

tersigned at LOS ANGELES, CALIF., 9-19-55 LC

BY D. C. Wright Agent

ion

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; or (j) nor shall this company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured; or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 60 consecutive days; or (c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy or by statute is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be canceled at any time at the request of the insured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be canceled at any time by this company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be canceled by giving to such mortgagee a 10 days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required and obtainable, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemised, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this company of any property.

When loss payable. The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Subrogation. This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this company.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

PEARL ASSURANCE COMPANY, LIMITED

U S Manager

PARAGRAPH NO.

DWELLING AND CONTENTS FORM

1. Insurance attaches only to those items described on the first page of this policy for which an amount is shown in the space provided therefor and for not exceeding said amount.

DESCRIPTION OF COVERAGE BY ITEMS

(See Paragraph No. 7 for Extensions of Coverage)

2. Item I (Building). Item I shall cover the described building, including additions in contact therewith, occupied principally for dwelling house purposes; lawns; also, if the property of the owner of the described building and when not covered under an item other than the building item of this or any other policy, building equipment, including cooking, heating, refrigerating, cooling, ventilating, washing and drying appliances, wall beds (EXCLUDING BEDDING) and floor coverings, fixtures, and outdoor equipment EXCLUDING TREES, SHRUBS AND PLANTS, all pertaining to the service of the described premises and while located thereon; also, while located on the described premises or adjacent thereto, materials and supplies intended for use in construction, alterations or repairs of the structures covered hereunder.

3. Item II (Contents). Item II shall cover household and personal property usual or incidental to the occupancy of the premises as a dwelling (EXCEPT ACCOUNTS, BILLS, CURRENCY, DEEDS, EVIDENCES OF DEBT, MONEY OR SECURITIES, AIRCRAFT, MOTOR VEHICLES AND BOATS OTHER THAN ROWBOATS AND CANOES) all belonging to the Insured or for which the Insured may be liable by law or may have prior to any loss assumed liability; or, at the sole option of the named Insured, belonging to a member of the Insured's family or to a servant of any such residing with the Insured; or which is being purchased under an installment plan, including any unpaid balance; all only while contained in the building(s) described as insurable under Item I and located on the described premises or while in the open on the described premises.

4. Item IV (Trees, Shrubs and Plants). Item IV shall cover trees, shrubs and plants, EXCEPT THOSE GROWN FOR COMMERCIAL PURPOSES, on the described premises, BUT THIS COMPANY SHALL NOT BE LIABLE FOR MORE THAN ITS PROPORTION OF ONE HUNDRED DOLLARS ($100.00) ON ANY ONE TREE, SHRUB OR PLANT.

5. Item V (Rental Value). Item V shall cover the rental value of the building and private structures described in Item I above, as furnished or equipped by the owner or lessor. The term "rental value" shall mean the fair rental value of such building or private structures or parts thereof, as furnished or equipped by the owner or lessor, whether rented or not, for the period of time required with the exercise of due diligence and dispatch to restore the same to a tenantable condition, less such charges and expenses as do not continue.

6. Item VI (Additional Living Expense). Item VI shall cover additional living expense resulting from damage or destruction, by a peril insured against, of the building or private structures described in Item I above, or the contents thereof. The term "additional living expense" shall mean the necessary increase in living expense incurred by the Insured for the purpose of continuing as nearly as practicable the normal standard of living of the Insured's household for the applicable period described in (a) or (b) below:

(a) The time required, with the exercise of due diligence and dispatch, to repair or replace such damaged or destroyed property.

(b) The time required for the Insured's household to become settled in any permanent quarters.

THE LIMIT OF LIABILITY HEREUNDER SHALL IN NO EVENT EXCEED TWENTY-FIVE PER CENT (25%) OF THE AMOUNT OF ADDITIONAL LIVING EXPENSE INSURANCE FOR ANY ONE MONTH.

THIS COMPANY SHALL NOT BE LIABLE FOR ADDITIONAL LIVING EXPENSE DUE TO THE CANCELLATION OF ANY LEASE, OR ANY WRITTEN OR ORAL AGREEMENT.

EXTENSIONS OF COVERAGE

7.1(a) **As respects Item I**, the Insured may apply, of the amount specified therefor, up to:

(1) Ten per cent (10%) to cover private structures appertaining to the described premises and located thereon, BUT NOT (a) STRUCTURES USED IN WHOLE OR IN PART FOR COMMERCIAL, MANUFACTURING, OR FARMING PURPOSES, NOR (b) ANY STRUCTURES (except structures used principally for private garage purposes) WHICH ARE WHOLLY RENTED OR LEASED TO OTHER THAN A TENANT OF THE DWELLING COVERED HEREUNDER.

(2) Ten per cent (10%) to cover rental values of the described building or private structures, as furnished or equipped by the owner or lessee, SUBJECT, HOWEVER, (a) TO THE PROVISIONS OF PARAGRAPH 5 OF THIS FORM; and (b) TO NOT EXCEEDING ONE-TWELFTH (1/12th) OF SAID TEN PER CENT (10%) FOR EACH MONTH OF UNTENANTABILITY.

7.1(b) **As respects Item II**, the Insured may apply, of the amount specified therefor, up to:

(1) Ten per cent (10%) to cover the property described in and covered by Item II (EXCEPT ROWBOATS, CANOES, ANIMALS, BIRDS AND PETS); while elsewhere than on the described premises, BUT WITHIN THE LIMITS OF THAT PART OF CONTINENTAL NORTH AMERICA INCLUDED WITHIN THE UNITED STATES OF AMERICA, ALASKA AND THE DOMINION OF CANADA, AND IN THE TERRITORY OF HAWAII; HOWEVER, IT IS AGREED BY THE INSURED THAT SUCH EXTENSION OF THIS INSURANCE SHALL IN NO WISE INURE DIRECTLY OR INDIRECTLY TO THE BENEFIT OF ANY CARRIER OR OTHER BAILEE.

(2) Ten per cent (10%) to cover improvements, alterations or additions to the described building and private structures, BUT ONLY IF THE INSURED IS NOT THE OWNER OF THE DESCRIBED PREMISES.

7.1 It is a condition of this insurance that in the event the Insured elects to apply the ten per cent (10%) optional provisions of Items I or II, THIS COMPANY SHALL NOT BE LIABLE FOR A GREATER PROPORTION OF ANY LOSS THAN WOULD HAVE BEEN THE CASE IF SIMILAR ELECTION WERE MADE UNDER OPTIONAL PROVISIONS OF ALL POLICIES COVERING THE SAME PROPERTY.

8. **INHERENT EXPLOSION CLAUSE:** This policy shall cover direct loss to the property covered caused by explosion originating to the described building or appurtenant private structures or in any structure containing property covered hereunder from fuel used for heating the building, BUT THIS COMPANY SHALL NOT BE LIABLE FOR LOSS BY EXPLOSION, RUPTURE OR BURSTING OF STEAM BOILERS, STEAM PIPES, STEAM TURBINES, STEAM ENGINES OR ROTATING PARTS OF MACHINES OR MACHINERY. ELECTRICAL ARCING, WATER HAMMER, AND THE BURSTING OF WATER PIPES ARE NOT EXPLOSIONS WITHIN THE INTENT OR MEANING OF THIS INHERENT EXPLOSION CLAUSE.

9. **DEBRIS REMOVAL CLAUSE:** 1. This policy covers expenses incurred in the removal of all debris of the property covered by this policy which may be occasioned by loss caused by any of the perils insured against, SUBJECT TO THE FOLLOWING CONDITIONS: 2. THIS COMPANY SHALL NOT BE LIABLE UNDER THIS POLICY AND THIS CLAUSE FOR: (a) MORE THAN THE AMOUNT OF INSURANCE PROVIDED IN THIS POLICY; (b) MORE THAN THE AMOUNT OF INSURANCE APPLYING UNDER THIS POLICY TO THE PROPERTY DAMAGED OR DESTROYED AFTER APPLICATION OF ANY DISTRIBUTION CLAUSE, NOR MORE THAN THE LIMIT OF LIABILITY UNDER THIS POLICY FOR A LOSS TO THE PROPERTY DAMAGED OR DESTROYED (INCLUDING THE COST OF DEBRIS REMOVAL) AS DETERMINED BY ANY CO-INSURANCE, AVERAGE OR REDUCED RATE CONTRIBUTION CLAUSE CONTAINED HEREIN; (c) ANY GREATER PROPORTION OF SUCH EXPENSE THAN THE AMOUNT OF INSURANCE HEREUNDER BEARS TO THE TOTAL AMOUNT OF ALL INSURANCE, WHETHER ALL SUCH INSURANCE CONTAINS THIS CLAUSE OR NOT; NOR (d) LOSS OCCASIONED BY THE ENFORCEMENT OF ANY STATE OR MUNICIPAL LAW OR ORDINANCE WHICH NECESSITATES THE DEMOLITION OF ANY PORTION OF THE BUILDING COVERED HEREUNDER WHICH HAS NOT SUFFERED DAMAGE BY ANY OF THE PERILS INSURED AGAINST IN THIS POLICY UNLESS SUCH LIABILITY IS OTHERWISE SPECIFICALLY ASSUMED BY THIS POLICY. 3. If this policy is divided into two or more items, the foregoing shall apply separately to each such item. 4. Cost of removal of debris shall not be considered in the determination of actual cash value when applying any Co-Insurance, Average, Distribution, or Reduced Rate Contribution clause attached to this policy.

10. **LOSS CLAUSE:** Any loss hereunder shall not reduce the amount of this policy.

11. **LIBERALIZATION CLAUSE:** If after issuance of this policy and before its expiration, there be adopted and published for use in this State by the fire insurance rating organization of which this Company is either a member or subscriber, any forms, endorsements or rules by which this insurance could be extended or broadened without additional premium charge, by endorsement or substitution of form, then, as to loss occurring after the effective date of such adoption and publication, such extended or broadened insurance shall inure to the benefit of the Insured hereunder as though such endorsement or substitution of form had been made.

12. **PERMITS AND AGREEMENTS CLAUSE:** Permission granted; (a) For other occupancies provided the dwelling building be principally occupied for dwelling house purposes, BUT EXCLUDING RETAIL AND WHOLESALE STORES AND COMMERCIAL MANUFACTURING OPERATIONS; (b) For such use of the premises as is usual and incidental to the occupancy as herein described; (c) To keep and use all articles and materials, usual and incidental to such occupancy, in such quantities as the exigencies of the occupancy require; (d) To maintain present and hereafter erected (SUBJECT TO THE EXCLUSIONS OF (a) ABOVE); (e) For the described building(s) to be in course of construction, alteration or repair, all without limit of time, and to build additions thereto, and this policy, under its respective item(s), shall cover on or in such additions in connect with the described building; (f) To release, by agreement made prior to any loss, any third party from liability for loss from the perils insured against due to any act or neglect of such third party; (g) To remain vacant or unoccupied without limit of time. This insurance shall not be jeopardized; (i) If any error is made in describing the location of the property covered hereunder; (2) By any act or neglect of the owner of the building if the Insured is not the owner thereof, or by any act or neglect of any occupant of the building (other than the named Insured), when such act or neglect of the owner or occupant is not within the control of the named Insured. Nothing herein contained shall be construed to amend the terms of this policy.

13. **MORTGAGEE CLAUSE:** If another mortgagee or loss payable endorsement applicable to buildings is separately attached to this policy, such other endorsement shall supersede the provisions of this clause. Loss (if any) under this policy, on buildings only, shall be payable to the mortgagee(s), if named as payee(s) on the first page of this policy, as mortgagee (s) under any present or future mortgage upon the property described in and covered by this policy, as interests may appear, and in order of precedence of said mortgages. (a) The terms "mortgage", "mortgagee" and "mortgagor" wherever used in this clause shall be deemed to include deeds of trust and the respective parties thereto. (b) This insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the described property, nor by the use of the premises for purposes more hazardous than are permitted by this policy. (c) Any mortgagee who shall have or acquire knowledge that the premises are being used for purposes more hazardous than are permitted by this policy or that the premises have been vacant or unoccupied beyond the period permitted by this policy, shall forthwith notify this Company thereof and shall cause the consent of the Company thereto to be noted on this policy; and in the event of failure so to do, all rights of such mortgagee hereunder shall forthwith terminate. (d) In case the mortgagor or owner shall fail to pay any premium due or to become due under this policy, the mortgagee hereby covenants and agrees to pay the same on demand. The mortgagee also covenants and agrees to pay on demand the premium for any increased hazard for the term of the existence thereof. (e) This Company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, under policies issued to, held by, or payable to the mortgagee, whether collectible or not. (f) The policy provisions relating to "Mortgagee Interests and Obligations" are specifically referred to and made a part of this clause.

PROVISIONS REFERRED TO IN AND MADE PART OF THIS FORM (No. 184NB)

14. **ELECTRICAL APPARATUS CLAUSE:** IF ELECTRICAL APPLIANCES OR DEVICES (INCLUDING WIRING) ARE COVERED UNDER THIS POLICY, THIS COMPANY SHALL NOT BE LIABLE FOR ANY ELECTRICAL INJURY OR DISTURBANCE TO THE SAID ELECTRICAL APPLIANCES OR DEVICES (INCLUDING WIRING) CAUSED BY ELECTRICAL CURRENTS ARTIFICIALLY GENERATED UNLESS FIRE ENSUES, AND IF FIRE DOES ENSUE THIS COMPANY SHALL BE LIABLE ONLY FOR ITS PROPORTION OF LOSS CAUSED BY SUCH ENSUING FIRE.

CAUTION

THE FOLLOWING EXTENDED COVERAGE (E. C.) IS EFFECTIVE AND A PART OF THIS POLICY ONLY WHEN A PREMIUM THEREFOR IS SEPARATELY CHARGED AND SHOWN ON THE FIRST PAGE OF THIS POLICY UNDER "OTHER PERILS AND COVERAGES". WHEN THIS EXTENDED COVERAGE IS PURCHASED, THE INSURED SHOULD SECURE LIKE COVERAGE ON ALL FIRE POLICIES COVERING THE PROPERTY COVERED HEREUNDER.

15.

EXTENDED COVERAGE (E. C.)

(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, Smoke, Except as Hereinafter Provided.)

In consideration of the premium for this coverage shown on the first page of this policy, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this Extended Coverage is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by **WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES AND SMOKE.**

THIS EXTENDED COVERAGE DOES NOT INCREASE THE AMOUNT OR AMOUNTS OF INSURANCE PROVIDED IN THIS POLICY.

If this policy covers on two or more items, the provisions of this Extended Coverage shall apply to each item separately.

SUBSTITUTION OF TERMS: In the application of the provisions of this policy, including riders and endorsements (but not this Extended Coverage), to the perils covered by this Extended Coverage, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

APPORTIONMENT CLAUSE: THIS COMPANY SHALL NOT BE LIABLE FOR A GREATER PROPORTION OF ANY LOSS FROM ANY PERIL OR PERILS INCLUDED IN THIS EXTENDED COVERAGE THAN (1) THE AMOUNT OF INSURANCE UNDER THIS POLICY BEARS TO THE WHOLE AMOUNT OF FIRE INSURANCE COVERING THE PROPERTY, WHETHER COLLECTIBLE OR NOT, AND WHETHER OR NOT SUCH OTHER FIRE INSURANCE COVERS AGAINST THE ADDITIONAL PERIL OR PERILS INSURED HEREUNDER; (2) NOR FOR A GREATER PROPORTION THAN THE AMOUNT HEREBY INSURED BEARS TO ALL INSURANCE, WHETHER COLLECTIBLE OR NOT, COVERING IN ANY MANNER SUCH LOSS; EXCEPT IF ANY TYPE OF INSURANCE OTHER THAN FIRE WITH EXTENDED COVERAGE OR WINDSTORM INSURANCE APPLIES TO ANY LOSS TO WHICH THIS INSURANCE ALSO APPLIES, THE LIMIT OF LIABILITY OF EACH TYPE OF INSURANCE FOR SUCH LOSS, HEREBY DESIGNATED AS "JOINT LOSS", SHALL FIRST BE DETERMINED AS IF IT WERE THE ONLY INSURANCE, AND THIS TYPE OF INSURANCE SHALL BE LIABLE FOR NO GREATER PROPORTION OF JOINT LOSS THAN THE LIMIT OF ITS LIABILITY FOR SUCH LOSS BEARS TO THE SUM OF ALL SUCH LIMITS. THE LIABILITY OF THIS COMPANY (UNDER THIS EXTENDED COVERAGE) FOR SUCH JOINT LOSS SHALL BE LIMITED TO ITS PROPORTIONATE PART OF THE AGGREGATE LIMIT OF THIS AND ALL OTHER INSURANCE OF THE SAME TYPE.

THE WORDS "JOINT LOSS", AS USED IN THE FOREGOING, MEAN THAT PORTION OF THE LOSS IN EXCESS OF THE HIGHEST DEDUCTIBLE, IF ANY, TO WHICH THIS EXTENDED COVERAGE AND OTHER TYPES OF INSURANCE ABOVE REFERRED TO BOTH APPLY.

WAR RISK EXCLUSION CLAUSE: THIS COMPANY SHALL NOT BE LIABLE FOR LOSS CAUSED DIRECTLY OR INDIRECTLY BY (a) HOSTILE OR WARLIKE ACTION IN TIME OF PEACE OR WAR, INCLUDING ACTION IN HINDERING, COMBATING OR DEFENDING AGAINST AN ACTUAL, IMPENDING OR EXPECTED ATTACK, (1) BY ANY GOVERNMENT OR SOVEREIGN POWER (DE JURE OR DE FACTO), OR BY ANY AUTHORITY MAINTAINING OR USING MILITARY, NAVAL OR AIR FORCES; OR (2) BY MILITARY, NAVAL OR AIR FORCES; OR (3) BY AN AGENT OF ANY SUCH GOVERNMENT, POWER, AUTHORITY OR FORCES, IT BEING UNDERSTOOD THAT ANY DISCHARGE, EXPLOSION OR USE OF ANY WEAPON OF WAR EMPLOYING ATOMIC FISSION OR RADIOACTIVE FORCE SHALL BE CONCLUSIVELY PRESUMED TO BE SUCH A HOSTILE OR WARLIKE ACTION BY SUCH A GOVERNMENT, POWER, AUTHORITY OR FORCES; (b) INSURRECTION, REBELLION, REVOLUTION, CIVIL WAR, USURPED POWER, OR ACTION TAKEN BY GOVERNMENTAL AUTHORITY IN HINDERING, COMBATING OR DEFENDING AGAINST SUCH AN OCCURRENCE.

WAIVER OF POLICY PROVISIONS: A claim for loss from perils included in this Extended Coverage shall not be barred because of change of occupancy, nor because of vacancy or unoccupancy.

FOUNDATIONS, EXCAVATIONS, ARCHITECT'S FEES AND EXCLUSIONS: If this policy covers a building, it shall cover direct loss by the perils insured against in this Extended Coverage to foundations, excavations, architect's fees, and all other portions of said building, even though this Company by this policy may have excluded foundations, excavations, architect's fees and such portions of said building from coverage against loss by fire.

The value of the portion or portions of said building so excluded from coverage against loss by fire shall not be considered in the determination of actual cash value when applying any Co-insurance, Average, Distribution or Reduced Rate Contribution Clause forming a part of this policy.

PROVISIONS APPLICABLE ONLY TO WINDSTORM AND HAIL: THIS COMPANY SHALL NOT BE LIABLE FOR LOSS CAUSED DIRECTLY OR INDIRECTLY BY (a) FROST OR COLD WEATHER OR (b) ICE (OTHER THAN HAIL), SNOWSTORM, SLEET, WAVES, TIDAL WAVE, HIGH WATER OR OVERFLOW, WHETHER DRIVEN BY WIND OR NOT.

THIS COMPANY SHALL NOT BE LIABLE FOR LOSS TO THE INTERIOR OF THE BUILDING OR THE PROPERTY COVERED THEREIN CAUSED, (a) BY WATER, RAIN, SNOW, SAND OR DUST, WHETHER DRIVEN BY WIND OR NOT, UNLESS THE BUILDING COVERED OR CONTAINING THE PROPERTY COVERED SHALL FIRST SUSTAIN AN ACTUAL DAMAGE TO ROOF OR WALLS BY THE DIRECT FORCE OF WIND OR HAIL AND THEN SHALL BE LIABLE FOR LOSS TO THE INTERIOR OF THE BUILDING OR THE PROPERTY COVERED THEREIN AS MAY BE CAUSED BY WATER, RAIN, SNOW, SAND OR DUST ENTERING THE BUILDING THROUGH OPENINGS IN THE ROOF OR WALLS MADE BY DIRECT ACTION OF WIND OR HAIL, OR (b) BY WATER FROM SPRINKLER EQUIPMENT OR OTHER PIPING, UNLESS SUCH EQUIPMENT OR PIPING BE DAMAGED AS A DIRECT RESULT OF WIND OR HAIL.

THIS COMPANY SHALL NOT BE LIABLE FOR LOSS TO THE FOLLOWING PROPERTY: (1) HAY, STRAW AND FODDER, ALL ONLY WHILE UNBALED AND LOCATED OUTSIDE OF BUILDING(S); OR (2) GROWING CROPS, WHEREVER LOCATED.

PROVISIONS APPLICABLE ONLY TO EXPLOSION: LOSS BY EXPLOSION SHALL INCLUDE DIRECT LOSS RESULTING FROM THE EXPLOSION OF ACCUMULATED GASES OR UNCONSUMED FUEL WITHIN THE FIREBOX (OR THE COMBUSTION CHAMBER) OF ANY FIRED VESSEL OR WITHIN THE FLUES OR PASSAGES WHICH CONDUCT THE GASES OF COMBUSTION THEREFROM, BUT THIS COMPANY SHALL NOT BE LIABLE FOR LOSS BY EXPLOSION, RUPTURE OR BURSTING OF STEAM BOILERS, STEAM PIPES, STEAM TURBINES, STEAM ENGINES OR ROTATING PARTS OF MACHINES OR MACHINERY, OWNED, OPERATED OR CONTROLLED BY THE INSURED OR LOCATED IN THE BUILDING(S) DESCRIBED IN THIS POLICY.

ELECTRICAL ARCING, WATER HAMMER, AND THE BURSTING OF WATER PIPES ARE NOT EXPLOSIONS WITHIN THE INTENT OR MEANING OF THESE PROVISIONS.

ANY OTHER EXPLOSION CLAUSE MADE A PART OF THIS POLICY IS SUPERSEDED BY THIS EXTENDED COVERAGE.

PROVISIONS APPLICABLE ONLY TO RIOT, RIOT ATTENDING A STRIKE AND CIVIL COMMOTION: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. UNLESS SPECIFICALLY ENDORSED HEREON IN WRITING, THIS COMPANY SHALL NOT BE LIABLE, HOWEVER, FOR LOSS RESULTING FROM DAMAGE TO OR DESTRUCTION OF THE DESCRIBED PROPERTY OWING TO CHANGE IN TEMPERATURE OR INTERRUPTION OF OPERATIONS WHETHER OR NOT SUCH LOSS IS COVERED BY THIS POLICY AS TO OTHER PERILS.

PROVISIONS APPLICABLE ONLY TO LOSS BY AIRCRAFT AND VEHICLES: Loss by aircraft includes direct loss by objects falling therefrom. THE TERM "VEHICLES", AS USED IN THIS EXTENDED COVERAGE, MEANS VEHICLES RUNNING ON LAND OR TRACKS, BUT NOT AIRCRAFT. THIS COMPANY SHALL NOT BE LIABLE, HOWEVER, FOR LOSS (a) BY ANY VEHICLE OWNED OR OPERATED BY THE INSURED OR BY ANY TENANT OF THE DESCRIBED PREMISES; (b) BY ANY VEHICLE TO FENCES, DRIVEWAYS, WALKS OR LAWNS; (c) TO ANY AIRCRAFT OR VEHICLE INCLUDING CONTENTS THEREOF OTHER THAN STOCKS OF AIRCRAFT OR VEHICLES IN PROCESS OF MANUFACTURE OR FOR SALE.

PROVISIONS APPLICABLE ONLY TO SMOKE: THE TERM "SMOKE", AS USED IN THIS EXTENDED COVERAGE, MEANS ONLY SMOKE DUE TO A SUDDEN, UNUSUAL AND FAULTY OPERATION OF ANY HEATING OR COOKING UNIT, ONLY WHEN SUCH UNIT IS CONNECTED TO A CHIMNEY BY A PIPE OR VENT, AND WHILE IN OR ON THE PREMISES DESCRIBED IN THIS POLICY, EXCLUDING, HOWEVER, SMOKE FROM FIREPLACES OR INDUSTRIAL APPARATUS.

PROVISIONS APPLICABLE ONLY WHEN THIS EXTENDED COVERAGE IS ATTACHED TO A POLICY COVERING ADDITIONAL LIVING EXPENSE, RENTS, LEASEHOLD INTEREST, OR CONSEQUENTIAL LOSS: WHEN THIS EXTENDED COVERAGE IS ATTACHED TO A POLICY COVERING ADDITIONAL LIVING EXPENSE, RENTS, LEASEHOLD INTEREST, OR CONSEQUENTIAL LOSS, THE TERM "DIRECT", AS APPLIED TO LOSS, MEANS LOSS, AS LIMITED AND CONDITIONED IN SUCH POLICY, RESULTING FROM DIRECT LOSS TO DESCRIBED PROPERTY FROM PERILS INSURED AGAINST, AND WHILE THE BUSINESS OF THE OWNER OR TENANT(S) OF THE DESCRIBED BUILDING(S) IS INTERRUPTED BY A STRIKE AT THE DESCRIBED LOCATION, THIS COMPANY SHALL NOT BE LIABLE FOR ANY LOSS OWING TO INTERFERENCE BY ANY PERSON(S) WITH REBUILDING, REPAIRING OR REPLACING THE PROPERTY DAMAGED OR DESTROYED OR WITH THE RESUMPTION OR CONTINUATION OF BUSINESS.

[Title of District Court and Cause.]

NOTICE OF FILING OF PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT, AND OF BOND AND CERTIFICATION

To the Plaintiff, Gertrude L. Brawner, and to William H. Brawner, Her Attorney:

You and Each of You Will Please Take Notice that on the 14th day of August, 1957, and prior to the service of this notice, the defendant herein, Pearl Assurance Company, Limited, a corporation, filed its petition for removal of the above-entitled cause to the District Court of the United States, for the Southern District of California, Central Division, together with a bond with good and sufficient surety, conditioned that the defendant, Pearl Assurance Company, Limited, a corporation, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the cause was not removable or was [12] improperly removed, together with a copy of all processes and pleadings served upon said defendant in such action. A true copy of said petition and said bond are served with this notice.

Dated at Los Angeles, California, this 14th day of August, 1957.

ANGUS C. McBAIN,
McBAIN & MORGAN,

By /s/ ANGUS C. McBAIN,
Attorneys for Said
Defendant.

Certification

I, Angus C. McBain, one of the attorneys for the defendant, Pearl Assurance Company, Limited, a corporation, hereby certify that on the 14th day of August, 1957, after filing said Petition for Removal in the District Court of the United States, for the Southern District of California, Central Division, I filed with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, in cause No. 682787 of said Court, a true copy of said defendant's said Petition for Removal of said cause No. 682787 to the District Court of the United States, for the Southern District of California, Central Division.

Dated at Los Angeles, California, this 14th day of August, 1957.

/s/ ANGUS C. McBAIN.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 14, 1957. [13]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Pearl Assurance Company, Limited, a corporation, and answering the complaint herein for itself only:

I.

As to Paragraph II, admits this defendant issued its policy of insurance No. D 11 52238 to plaintiff

in consideration of premium payments and that its said policy in the sum issued and endorsed was in force and effect at the time of the fire referred to in the complaint. Defendant admits that Exhibit "A" is a true copy of its policy except that it denies the endorsement captioned "General Change Endorsement" was issued by this defendant or that it was ever in whole or in part included in defendant's policy. Defendant denies that its policy provided for payment or indemnification [15] of plaintiff for any loss or losses in excess of an aggregate of $7,500.00, and denies all allegations contained in said Paragraph II not herein specifically admitted.

II.

As to Paragraph III, alleges it has no information or belief on the subject sufficient to enable it to answer and upon that ground denies the same and each and every allegation therein contained.

III.

As to Paragraph IV, defendant admits plaintiff reported the fire involving her alleged property and demanded the sum of $7,500.00; admits this defendant has refused and continues to refuse to pay the loss claimed or alleged by plaintiff or any part thereof, except for plaintiff's loss of rentals in an amount not exceeding the policy coverage, for which defendant admits liability and hereby tenders payment; defendant denies each and every allegation contained in said Paragraph IV not herein admitted or otherwise specifically denied; denies that there

is now or ever was due, owing or unpaid to plaintiff from defendant the sum of $7,500.00 or any other sum or interest on said or any sum at the rate of 7% per annum or at any rate or for any period of time.

IV.

As to Paragraph V, defendant denies that the loss sustained by plaintiff as alleged in the complaint or at all is covered under the terms of defendant's policy except for the loss of rentals in the sum of $150.00 alleged by plaintiff which defendant admits, has offered to pay and hereby offers to pay in full settlement of plaintiff's claims.

As a First, Separate and Affirmative Defense to the Complaint, This Answering Defendant [16] Alleges:

I.

That plaintiff suffered no loss by reason of the fire referred to in her complaint in that the entire property located at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California, including the improvements thereon which were the subject of defendant's insurance policy, were in the process of being condemned by the County of Los Angeles at the time of said fire by condemnation suit No. 658447 then pending in the Superior Court of the State of California, in and for the County of Los Angeles, and within approximately sixty days after said fire said condemnation was completed by judgment in said Superior Court action and plaintiff was awarded and received the full value of said prop-

erty in its condition immediately before the said fire and without diminution because of the physical damage caused by said fire.

Wherefore, this answering defendant prays that plaintiff take nothing by her complaint on file herein and that it go hence with its costs, and for such other relief as appears meet and proper.

ANGUS C. McBAIN,
McBAIN & MORGAN,

By /s/ ANGUS C. McBAIN,
Attorneys for Answering Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 14, 1957. [17]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Plaintiff, Gertrude L. Brawner, and to William L. Brawner, Her Attorney:

Please Take Notice that the defendant, Pearl Assurance Company, Limited, will bring the within Motion for Summary Judgment on for hearing before this Honorable Court in Courtroom 5 of the Honorable Harry Westover, Judge of said Court,

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Defendant, Pearl Assurance Company, Limited, a Corporation, and to Angus McBain and McBain & Morgan, Its Attorneys:

Please Take Notice that plaintiff, Gertrude L. Brawner, will bring the within Motion for Summary Judgment on for hearing before the hereinabove court in Courtroom 5 of the Honorable Harry C. Westover, Judge of said court, on the 17th day of February, 1958, at 10:00 a.m. or as soon thereafter as counsel may be heard.

Dated: This 7th day of February, 1958.

/s/ WILLIAM H. BRAWNER,
Attorney for Plaintiff,
Gertrude L. Brawner. [28]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT (Plaintiff)

The plaintiff, Gertrude L. Brawner, now moves the court to enter judgment against the defendant, Pearl Assurance Company, Limited, a corporation, and in favor of said plaintiff and as grounds for said motion plaintiff states:

I.

It appears from the papers and pleadings on file herein and from certain documents introduced in evidence in this case, Defendant's Exhibit A, which were certified from the condemnation proceeding evidence, being case No. 658447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Browner, et al., filed April 4, 1956, in the Superior Court of the State of California, in and for the County of Los Angeles, that:

(a) On the 22nd day of October, 1955, defendant, Pearl Assurance Company, Limited, a corporation, for a consideration issued to plaintiff its Policy of Insurance No. D1152238, a copy of which is attached to plaintiff's complaint marked Exhibit [29] "A" for identification and made a part thereof.

(b) Thereafter from time to time, for a paid premium, defendant continued said policy in full force and effect up to and including the 22nd day of October, 1958, agreeing to pay Gertrude L. Brawner for loss by fire to the limit thereof, to wit, the sum of $7,500.00, together with loss of rental and other covenants as in said policy set forth.

(c) On or about the 4th day of February, 1957, plaintiff was the legal owner of those certain improved premises known as 125-127-127½ South Bunker Hill Avenue, Los Angeles, California. That on the 4th day of February, 1957, said improvements were destroyed by fire.

(d) That prior to filing complaint herein, to wit, on the 4th day of February, 1957, plaintiff duly reported said loss to defendant and demanded that they pay said loss as provided in said policy but that defendants have failed to pay said sum or any part thereof.

II.

That plaintiff herein entered into a stipulation for Judgment in said action No. 658447 with the County of Los Angeles which was filed in the records of said action on April 5, 1957, which said stipulation is designated as defendant's Exhibit "A" in this action and by reference incorporated in and made a part hereof. That said stipulation provided in part as follows:

(a) That the defendant, Gertrude L. Brawner, is the owner of the real property described in the complaint herein as Parcel 55-4 (said property being the location of the buildings insured under defendant's policy of fire insurance).

(b) That the market value of said real property, together with any and all improvements thereon, including any and all severance damage which may be caused to other properties owned by said defendant by the taking thereof, is the sum of [30] $26,400.00.

(c) That the plaintiff may have an interlocutory judgment without further notice to said defendant as to the real property finding and determining that the public interest and necessity require the acquisi-

tion of the fee simple title in and to said real property for the public purposes set forth in the complaint herein and that said real property has not heretofore been appropriated to any public use.

(d) That upon the payment to the defendant, Gertrude L. Brawner, or into court for her benefit, of the total sum of $26,400.00, less the amount, if any, of delinquent taxes, penalties, and costs, plaintiff, County of Los Angeles may have, without further notice to said defendant, a final order of condemnation vesting in the plaintiff the fee simple title to said real property for the public purposes set forth in the complaint herein.

III.

That on April 5, 1957, more than one year after the filing of said action, pursuant to said stipulation in said action No. 658447, interlocutory judgment was entered in favor of the County of Los Angeles and against the defendant therein, Gertrude L. Brawner (said interlocutory judgment being designated herein as defendant's Exhibit "A"), which said judgment provided in part as follows: Now, Therefore, in accordance with said stipulation, records and files herein, and the court being fully advised in the premises, it is hereby found and determined:

(a) That the defendant, Gertrude L. Brawner, is the owner of the real property described in the complaint herein as Parcel 55-4.

(b) That the market value of said real property, together with any and all improvements thereon, including any and all severance damage which may be caused to the remainder of the said real property by the taking thereof is the sum of $26,400.00. [31]

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff, County of Los Angeles, shall take for the uses set forth in the complaint the fee simple title in and to said real property and that a final order of condemnation may be entered herein vesting in the plaintiff the fee simple title in and to said real property for the public purposes set forth in said complaint upon payment by the plaintiff of the following sum in the manner indicated, or into court for the benefit of the person named to be disbursed by the clerk thereof in accordance herewith: To: Gertrude L. Brawner—$26,400.00.

IV.

That Gertrude L. Brawner, as found and determined in said condemnation judgment hereinabove set forth, at all times mentioned therein and until the payment of said sum of $26,400.00, on the 12th day of April, 1957, pursuant to California Civil Code, Section 1253, and until final judgment was entered in said condemnation action, was the legal owner in fee simple of said property upon which were located the premises destroyed by fire on February 4, 1957, insured under defendant Pearl Assurance Company, Limited, a corporation, policy No. D1152238.

V.

That defendant's, Pearl Assurance Company, Limited, a corporation, policy No. D1152238 was an open California Standard Form Fire Insurance Policy and at all times mentioned herein was in full force and effect. On the date of said fire, February 4, 1957, plaintiff Gertrude L. Brawner, legal owner thereof, became entitled to indemnification for loss sustained pursuant to California Insurance Code Section 2051.

VI.

This motion will be made upon all the pleadings, papers, files, authorities and exhibits on file herein, upon the Affidavit of William H. Brawner served and filed herewith and upon any [32] affidavits and points and authorities which may hereafter be served and filed prior to the hearing of this motion.

Dated at Los Angeles, California, this 7th day of February, 1958.

/s/ WILLIAM H. BRAWNER,
Attorney for Plaintiff,
Gertrude L. Brawner.

Receipt of copy acknowledged.

[Endorsed]: Filed February 10, 1958. [33]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (Plaintiff)

State of California,
County of Los Angeles—ss.

William H. Brawner, being first duly sworn, deposes and says:

That at all times herein mentioned he was and now is an attorney at law duly admitted to practice in all counties of the State of California and admitted to practice as an attorney in the above-entitled court.

That your affiant herein at all times during the pendency of Condemnation Action No. 658447, in the Superior Court of the State of California, in and for the County of Los Angeles, entitled County of Los Angeles vs. Anna Anderson, et al., filed April 4, 1956; that your affiant herein did personally represent the defendant, Gertrude L. Brawner, in said last-mentioned action in connection with Parcel No. 55-4. [35]

That in said aforementioned action your affiant herein did cause to be prepared and filed in said proceeding an answer to Complaint in Eminent Domain wherein it is alleged that the property belonging to said defendant, Gertrude L. Brawner, is improved and of a value of not less than $75,000.00.

That a certified copy of said Answer is attached to this affidavit and made a part hereof the same as though set forth in full at this portion of this affidavit.

That the improvements upon said Parcel 55-4 hereinabove referred to consisted of a 14-room dwelling operated as an apartment house and that said improvements were destroyed by fire on February 4, 1957. That your affiant personally conducted the negotiations with the County Counsel of the County of Los Angeles for the settlement of said condemnation action and at no time prior to said loss did said defendant, Gertrude L. Brawner, or your affiant acting on her behalf, agree to accept from the County of Los Angeles any sum less than the amount set forth in said Answer hereinabove referred to, to wit: $75,000.00.

That subsequent to said fire and after the destruction of the improvements on said premises your affiant did negotiate with and conclude a settlement with the County of Los Angeles wherein said County of Los Angeles did, on April 12, 1957, by judgment of condemnation, acquire the real property described as Parcel 55-4 and the then remaining improvements on said premises after the loss by fire hereinabove referred to.

That said judgment decreed that Gertrude L. Brawner was at all times mentioned in said proceeding, and had been and was on April 12, 1957, the legal owner of said property.

That affiant knows of his personal knowledge and therefore alleges that at no time did the said defendant, Gertrude L. Brawner, or anyone in her behalf receive payment or value in money or otherwise for the premises destroyed by fire and covered by the fire insurance policy upon which the above-entitled action is prosecuted. [36] That at all times up to the entry of the decree of condemnation the said Gertrude L. Brawner was the owner of the real property and improvements thereon in fee simple and no equitable interest of any kind or character were outstanding or existed as against said property.

That at all times mentioned and at the time of the destruction of said premises by fire on February 4, 1957, the said Gertrude L. Brawner was the legal owner of and as such had an insurable interest in the improvements on said real property hereinabove referred to and said policy of Pearl Assurance Company, Limited, a corporation, was in full force and effect and by reason of said fire the said Gertrude L. Brawner was entitled to receive the sum of $7,500.00 for the destruction of said premises together with the sum of $150.00 for loss of rentals, together with interest thereon at the rate of 7% per annum from February 4, 1957, to date of payment.

That said stipulation entered into by and between Gertrude L. Brawner and the County of Los Angeles upon which interlocutory judgment was entered in her favor in the sum of $26,400.00 was based upon the value of the property at the time said judgment was entered and only for the prop-

erty actually taken as provided by statute which was subsequent to the destruction by fire of the improvements insured by the defendant herein, Pearl Assurance Company, Limited, a corporation.

Said County of Los Angeles knew at the time said stipulation for Judgment was entered that said property had been destroyed by fire and accepted and paid for said fee simple title from defendant, Gertrude L. Brawner, in the then existing condition of the property involved.

That said sum so paid by Condemnor on April 12, 1957, was for the property "actually taken" by Condemnor at the time of taking and was taken pursuant to C.C.P. 1249 and C.C.P. 1253. That no part of said sum was paid by Condemnor for the non-existing improvements which had been destroyed by fire on February 4, 1957.

Defendant, Pearl Assurance Company, Limited, a corporation, [37] admits liability under their policy to plaintiff insured for certain losses incurred by fire, to wit, the sum of $150.00 for loss of rental. In so doing they admit complete liability for all loss.

That the loss by fire occurred on February 4, 1957, and under the open policy here involved, the measure of indemnity under the policy is the expense to the insured of replacing the thing lost or injured in its condition at the time of injury, such expense being computed as of the time of the commencement of the fire as provided in the Insurance Code of California, Section #2051.

It is the position of plaintiff that she is entitled to judgment for the value of the insured property destroyed by fire to the extent of such loss as a matter of law.

However, if it be found that she is not so entitled to recovery as a matter of law there then exists an issue as to whether or not at the time the condemnation judgment was entered it included payment for the destruction of the insured property two months previous, which said property was never actually taken by the Condemnor, County of Los Angeles.

That a controversy exists as to whether or not plaintiff, Gertrude L. Brawner, received any compensation whatever for the property destroyed by fire from the Condemnor, County of Los Angeles.

Dated: February 7, 1958.

/s/ WILLIAM H. BRAWNER.

Subscribed and sworn to before me this 7th day of February, 1958.

[Seal] /s/ CARL G. CRAMOLINE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 27, 1959. [38]

In the Superior Court of the State of California
in and for the County of Los Angeles
No. 658447

COUNTY OF LOS ANGELES, a Body Corporate and Politic,

Plaintiff,

vs.

ANNA ANDERSON, GERTRUDE L. BRAWNER, et al.,

Defendants.

ANSWER TO COMPLAINT IN EMINENT DOMAIN

Comes now the defendant, Gertrude L. Brawner, and answering complaint herein for herself alone and for no other defendant, admits, denies and alleges as follows:

I.

This answering defendant admits that at all times mentioned herein she has been and now is a married woman and the owner in fee simple, as her separate property, of that certain real estate described in said complaint on Page 9 thereof as follows:

Parcel 55-4:

Part A:

Lot 12, Block "J," Mott Tract, in the City of Los Angeles, County of Los Angeles, State of California, as shown on map recorded in Book 1, page 489 of Miscellaneous Records, in the office of the recorder of said County.

Excepting therefrom the southeasterly 20 feet thereof within [39] the lines of Bunker Hill Avenue.

Part B:

That portion of the southeasterly 15 feet of Hope Street, vacated by Los Angeles City Ordinance No. 7608, New Series, which lies northwesterly of and adjoins the northwesterly line of above-described Lot 12.

This answering defendant alleges that said property is free and clear of all encumbrances except such governmental assessments, taxes or liens as may be currently of record.

II.

Plaintiff further alleges that said property is improved and of a value of not less than Seventy-five Thousand Dollars ($75,000.00).

III.

That this defendant has not sufficient information or belief to enable her to answer the allegations of said complaint not herein expressly admitted and basing her denial on said ground denies generally and specifically each and every allegation therein contained and set forth.

/s/ WILLIAM H. BRAWNER,
Attorney for Defendant
Gertrude L. Brawner.

Receipt of copy acknowledged.

[Endorsed]: Filed November 15, 1956, Superior Court.

[Endorsed]: Filed February 10, 1958. [40]

[Title of District Court and Cause.]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the plaintiff, Gertrude L. Brawner, appearing by her counsel, William H. Brawner, and files opposition to the proposed Findings of Fact and Conclusions of Law by defendant on the following grounds, and in particular to Paragraph IV thereof, as follows:

That said proposed Findings are contrary to the facts of this case and contrary to law in that it appears from the papers, pleadings and files of this action that the alleged value of plaintiff's property prior to the fire, in condemnation action Case No. 658447, was of the value of $70,000.00 as of the date of filing thereof on April 4, 1956; that the insured improvements thereon were destroyed by fire on February 4, 1957.

That pursuant to stipulation between plaintiff herein, Gertrude L. Brawner, and the plaintiff in said condemnation action, County of Los Angeles, the property actually taken by Condemnor after the fire and at the time said judgment was entered was of [42] the value of $26,400.00. It also appears from said judgment entered in said condemnation action on April 5, 1957, that Gertrude L. Brawner was on said date and at all times subsequent to April 4, 1956, had been the fee simple legal owner of said property. It further appears that said Ger-

trude L. Brawner continued as the fee simple legal owner of said property as decreed in said judgment (Defendant's Exhibit A) until payment in full was made by the County on April 12, 1957, at which time the fee simple title of Gertrude L. Brawner was transferred to the County of Los Angeles, State of California, pursuant to Civil Code Section 1253, which said section provides in part "when payments have been made * * * the court must make a final order of condemnation which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the County, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

It further appears that pursuant to Section 2051 of the California Insurance Code that the loss pursuant to the policy of insurance was due and payable to the legal owner of the property at the time of the destruction of the property by fire, to wit, on the 4th day of February, 1957.

That it is not true that the value of the property condemned including the insured building was $26,400.00 as of the date of commencement of the condemnation proceeding, to wit, April 4, 1956. That it is not true that the amount paid by the County to the insured, Gertrude L. Brawner, was paid without diminution because of the fire and destruction of the said insured property and there is no evidence to support such a finding. On the contrary, Condemnor took and paid only for the property

actually existent as of the date of taking as provided by statute.

Defendant's proposed Conclusions of Law are without [43] support for the reasons hereinabove stated and as further set forth in plaintiff's Points and Authorities filed herewith and by reference incorporated herein and made a part hereof.

Wherefore, plaintiff prays that defendant's proposed Findings of Fact and Conclusions of Law and the judgment proposed thereon be rejected and that judgment be granted plaintiff pursuant to the terms of the insurance policy for the sum of $7,500.00 plus loss of rentals for which liability is admitted by the insurer under the terms of the policy in the sum of $150.00.

Dated this 7th day of February, 1958.

/s/ WILLIAM H. BRAWNER.
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 10, 1958. [44]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Present: Hon. Harry C. Westover, District Judge;
Counsel for Plaintiff: Ernest W. Pitney (for William Brawner, Esq.);
Counsel for Defendants: Angus C. McBain.

Proceedings:

For (1) hearing motion of defendant Pearl Assurance Co., (filed 1/29/58), for summary judgment;

(2) hearing motion of plaintiff (filed 2/10/58), for summary judgment.

Court makes a statement.

Attorney Pitney makes a statement.

Court makes a further statement and grants motion of defendant for summary judgment.

Counsel for defendants to prepare findings and judgment.

JOHN A. CHILDRESS,
Clerk,

By /s/ MARY O. SMITH,
Deputy Clerk. [57]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Gertrude L. Brawner, appearing by her counsel, William H. Brawner and Ernest W. Pitney, and files her opposition to the proposed Findings of Fact and Conclusions of Law

after Motion for Summary Judgment by defendant on the following grounds as follows:

Point I.

That said Proposed Findings are not supported by the pleadings and the evidence and are contrary thereto.

I.

In support of Point I above and in furtherance thereof:

(a) It appears without conflict as shown by the pleadings, records and exhibits on file herein that plaintiff was at all times herein mentioned the legal owner in fee simple of the improved real property and the insured, under the policy sued upon. That said legal title of plaintiff was made a matter of judgment record in [58] condemnation proceeding Case No. 358447, as appears by Defs. Ex. A herein, until on or about April 12, 1957, approximately two months after the fire loss, at which time the fee simple title of Gertrude L. Brawner was transferred to the County of Los Angeles, State of California pursuant to Code of Civil Procedure 1253.

(b) That it appears without conflict from the pleadings and the evidence that the value of the property condemned, including the insured buildings, was stated by the insured to be in the sum of $70,000.00 prior to the loss by fire.

(c) That said insured property was destroyed by fire on February 4, 1957. That insured on said date was the legal owner thereof.

(d) That there are no pleadings or evidence of any kind in the case which indicate that the value of the property condemned including the insured building was $26,400.00 as of the date of the commencement proceeding, to wit, on April 4, 1956. That prior to the time of entry of Judgment by Stipulation in said condemnation proceeding, more than one year after April 4, 1956, the filing date of said action, and approximately two months after the fire, the parties stipulated for the entry of a judgment adjudging the value of the property as then existed to be the sum of $26,400.00 and adjudging the insured to be the then legal owner. That the insured improvements had, prior to said date, to wit on February 4, 1957, been destroyed by fire and were non-existent.

(e) There is no evidence whatever in the record to sustain any part of Paragraph IV of defendant's proposed findings. [59]

(f) That Subindent (b) thereof is not only without evidence to support it but is misleading and untrue.

Subindent (c) of said Paragraph IV is without support in the record and is misleading and untrue.

II.

That said condemnation action No. 358447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, et al., without delay caused by Defendant, Gertrude L. Brawner, was not

brought to trial within one year from date of the commencement thereof on April 4, 1956.

Point II.

That said Findings are not supported by law and are contrary thereto.

I.

A contract of insurance is purely a personal contract between the insured and the insurance company.

14 RCL 1365, Sec. 535;

John Weise, Inc. v. Notie Reed,
22 Tenn. appeals 90;

Vyn v. Northwest Casualty Co.,
47 Cal. 2d 89.

Cal. Ins. Code Section 250 provides:

"Except as provided in this article any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code."

Cal. Ins. Code Section 2051 provides: Measure of Indemnity under open policy:

"Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire." [60]

Cal. Ins. Code Sec. 281 provides as follows:

"Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

Cal. Ins. Code 301 provides:

"A change of interest in a subject insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss."

In support of Point II herein plaintiff submits the authorities cited above and those heretofore filed in opposition to defendant's Motion for Summary Judgment and in support of plaintiff's Motion for Summary Judgment as though here set forth in detail and makes the same a part of these objections.

Dated: This 21st day of February, 1958.

WILLIAM H. BRAWNER and
ERNEST W. PITNEY,

By /s/ WILLIAM H. BRAWNER,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 25, 1958. [61]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT

(Plaintiff)

The above matter having come on for hearing before the above-entitled Court on Motion for Summary Judgment by the plaintiff, Honorable Harry C. Westover, Judge presiding, the plaintiff appearing by her counsel, William H. Brawner and Ernest W. Pitney, and the defendant Pearl Assurance Company, Limited, a corporation, appearing by its counsel McBain & Morgan and Angus C. McBain, Esq., and the Court having granted said motion hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

At the commencement of this action plaintiff, Gertrude L. Brawner was and has ever since been a citizen and resident of California and the defendant, Pearl Assurance Company, Limited, a corporation, was and ever since has been a corporation organized under the laws of and a citizen and resident of the Kingdom of Great [63] Britain and this action involves a controversy between citizens and residents of different states and the amount in dispute or controversy exceeds the sum and value of $3,000.00.

II.

Said Pearl Assurance Company, Limited, a corporation, on October 2, 1955, for value received, duly issued its policy of Fire Insurance No. D1152238 in the California Standard Form prescribed, for fire insurance policies by laws of the State of California, insuring said plaintiff, Gertrude L. Brawner, against loss by fire to the building situate at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California.

III.

That said property was destroyed by fire on February 4, 1957.

IV.

That said defendant, Pearl Assurance Company, Limited, a corporation, policy No. D1152238 was in full force and effect at the time said building was destroyed.

V.

The insured, Gertrude L. Brawner, duly reported the occurrance of said fire and the destruction of the building to said insurance company and demanded payment of the full amout of insurance on the building with legal interest thereon and of the sum of $150.00 loss of rentals.

VI.

That the insured, Gertrude L. Brawner, was the owner in fee simple and in possession of said insured property on said February 4, 1957, and continued as such until April 12, 1957. That the loss

sustained by the fire became payable to the insured legal owner, Gertrude L. Brawner, at the time the fire occurred. That by reason of said fire and the destruction of said insured property, plaintiff Gertrude L. Brawner became entitled to payment for the loss sustained, to wit, the sum of $7,500.00, plus the sum of $150.00 per [64] loss of rentals.

VII.

That at the time said insured property was destroyed the entire property at the above-mentioned address was being condemned by the County of Los Angeles, a political subdivision of the State of California, in Case No. 658447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, et al., in the Superior Court of the State of California, in and for the County of Los Angeles. That at the time of said fire the said County of Los Angeles had not taken possession of said property and no judgment of condemnation had been entered on said property and no award of any kind had been made by said condemning body to Gertrude L. Brawner.

VIII.

That subsequent to the loss sustained by said plaintiff and on April 5, 1957, judgment by stipulation was entered between County of Los Angeles and said Gertrude L. Brawner for the then value of said property, to wit, the sum of $26,400.00. That thereafter and on the 12th day of April, 1957, payment was made by said County of Los Angeles to

said Gertrude L. Brawner of the amount of said interlocutory judgment and the fee simple title transferred by said Gertrude L. Brawner to the County of Los Angeles pursuant to law.

IX.

That said condemnation action entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, et al., Los Angeles Superior Court Case No. 658447 was not brought to trial within one (1) year from date of filing said action.

X.

That the stipulation entered into by and between plaintiff and Gertrude L. Brawner in said condemnation action No. 658447 relates only to the real property and the then existing improvements. [65] It does not relate to nor purport to relate to the non-existing improvements theretofore destroyed by fire.

XI.

That defendant admits liability to the insured Gertrude L. Brawner as legal owner as of the date of the fire, to wit, February 4, 1957, with an insurable interest therein for loss of rentals under said policy.

XII.

That plaintiff, Gertrude L. Brawner, sustained loss by reason of the destruction of said building in the sum of $7,500.00 and of rentals in the sum of $150.00.

From the foregoing Findings of Fact, the court makes the following

Conclusions of Law

I.

That the defendant, Pearl Assurance Company, Limited, a corporation, have judgment herein in its favor and against the plaintiff, Gertrude L. Brawner.

II.

That this cause be dismissed as to defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, and Black & White Company, a corporation.

Done in Open Court this day of February, 1958.

....., Judge.

Receipt of copy acknowledged.

Lodged February 28, 1958. [66]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Proposed by Defendant)

The above matter having come on for hearing before the above-entitled Court, Honorable Harry C. Westover, Judge Presiding, on February 17, 1958, on motion for summary judgment made by the dedendant, Pearl Assurance Company, Limited, and on motion for summary judgment made by the plaintiff, Gertrude L. Brawner; and the plaintiff appear-

ing by her counsel, William H. Brawner, Esq., and Ernest W. Pitney, Esq., and said defendant appearing by its counsel, Angus C. McBain, Esq., and the Court having denied said motion of plaintiff and having granted said motion of defendant, now, therefore, the Court hereby makes the following:

Findings of Fact

I.

At the commencement of this action plaintiff, Gertrude L. Brawner, was and has ever since been a citizen and resident of California and the defendant, Pearl Assurance Company, Limited, was and ever since has been a corporation organized under the laws of and a citizen and resident of the Kingdom of Great Britain and this action therefore involves a controversy between citizens and residents of different states and the amount in dispute or controversy exceeds, exclusive of interest and costs, the sum and value of $3,000.00.

II.

Said defendant's policy of fire insurance, No. D1152238, in the California standard form prescribed for fire insurance policies by the laws of the State of California, insuring said plaintiff against loss by fire to the building situate at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California, was in force and effect at the time said building was destroyed by fire on February 4, 1957.

Plaintiff duly reported the occurrence of said fire and the destruction of the building to defendant and

demanded payment of the full amount of insurance on the building with legal interest thereon and of the sum of $150.00 loss of rentals.

IV.

Plaintiff sustained no loss by reason of said fire and destruction (except for possible loss of rentals mentioned in Paragraph V of these findings) and had no insurable interest in the building at the time of its destruction for the following reasons:

a. At the time said building was destroyed the entire property at the above mentioned address was being condemned by the County of Los Angeles, a political subdivision of the State of California, in Case No. 658447 of the Superior Court of the State of California, in and for the County of Los Angeles;

b. Prior to the commencement of this action on the insurance policy, plaintiff, Gertrude L. Brawner, and said County stipulated and contracted in said condemnation action that the value of the entire property, including the insured building, was $26,400.00 as of the date provided by the laws of the State of California for assessment of value in condemnation actions, to wit, the date of the commencement of the condemnation proceeding, April 4, 1956, and further stipulated that judgment should be entered in the condemnation action for said Gertrude L. Brawner against the County for the sum so agreed upon; and

c. Judgment was entered accordingly in said sum of $26,400.00 on April 12, 1957, and plaintiff

was paid the full amount of said judgment by the County of Los Angeles prior to the commencement of the above-entitled action without reduction or diminution because of the aforesaid fire and destruction of the building.

V.

Plaintiff may have sustained loss of rentals by reason of the destruction of said building in the sum of $150.00 but this presents no genuine issue for consideration by the Court because defendant has admitted liability for said claim and has tendered payment thereof to plaintiff and continues to admit liability and tender payment of said amount.

VI.

It appearing from the pleadings and other proceedings before the Court that no cause of action has been alleged, claimed or attempted against the defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, Black & White Company, a corporation, the Court finds there is no genuine issue for consideration by the Court between said defendants and any of the other parties to this action and that this cause should, therefore, be dismissed as to said defendants. [70]

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That the defendant, Pearl Assurance Company, Limited, a corporation, have judgment herein in its

favor and against the plaintiff, Gertrude L. Brawner.

II.

That this cause be dismissed as to defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, and Black & White Company, a corporation.

Done In Open Court this 25th day of February, 1958.

/s/ HARRY C. WESTOVER,
Judge.

Lodged February 24, 1958.

[Endorsed]: Filed February 25, 1958.

Entered: February 26, 1958.

In the District Court of the United States for the Southern District of California, Central Division

No. 989-57—HW

GERTRUDE L. BRAWNER,

Plaintiff,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a Corporation, et al.,

Defendants.

JUDGMENT
(Proposed by Defendant)

The above matter having come on for hearing before the above-entitled Court, Honorable Harry

C. Westover, Judge Presiding, on February 17, 1958, on motion for summary judgment made by the defendant, Pearl Assurance Company, Limited, and on motion for summary judgment made by the plaintiff, Gertrude L. Brawner; and the plaintiff appearing by her counsel, William H. Brawner, Esq., and Ernest W. Pitney, Esq., and said defendant appearing by its counsel, Angus C. McBain, Esq., and the Court having denied said motion of plaintiff and having granted said motion of defendant, and having made findings of fact and conclusions of law herein, now, therefore,

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of defendant, Pearl Assurance Company, Limited, a corporation, and against the plaintiff, Gertrude L. Brawner, and that said defendant recover its costs herein.

It Is Further Ordered that this cause be and it is hereby dismissed as to defendants John Doe, Richard Roe, Doe One to Twenty, inclusive, and Black & White Company, a corporation.

Done In Open Court this 25th day of February, 1958.

/s/ HARRY C. WESTOVER,
Judge.

Costs taxed, $29.25.

Lodged February 24, 1958.

[Endorsed]: Filed February 25, 1958.

Entered: February 26, 1958. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Defendant, Pearl Assurance Company, Limited, a Corporation, and to Angus C. McBain and McBain & Morgan, Its Attorneys:

Notice Is Hereby Given that Gertrude L. Brawner, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from:

(1) The Judgment on Motion for Summary Judgment in favor of the defendant, Pearl Assurance Company, Limited, a corporation.

(2). From the Judgment denying Motion for Summary Judgment of plaintiff, Gertrude L. Brawner, and

(3) From the whole of the Final Judgment entered in this action on the 26th day of February, 1958.

Dated: This 25th day of March, 1958.

WILLIAM H. BRAWNER and
ERNEST W. PITNEY,

By /s/ WILLIAM H. BRAWNER,
Attorneys for Appellant,
Gertrude L. Brawner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 80, inclusive, containing the original:

Petition for Removal of Cause to United States District Court, with copy of Superior Court Summons and Complaint.

Answer of Pearl Assurance Company.

Statement of Plaintiff's Case With Authorities.

Defendant's Notice of Motion for Summary Judgment.

Plaintiff's Notice of Motion for Summary Judgment.

Affidavit of William H. Brawner in Support of Motion for Summary Judgment (Plaintiff).

Plaintiff's Opposition to Defendant's Proposed Findings of Fact and Conclusions of Law.

Statement of Case With Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment.

Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law After Motion for Summary Judgment.

Proposed Findings of Fact and Conclusions of Law on Motion for Summary Judgment (Plaintiff).

Findings of Fact and Conclusions of Law and Judgment, Entered 2/26/58.

Notice of Appeal.

Designation of Contents of Record on Appeal.

B. Minute Order of 2/17/58 re hearing on motions for summary judgments.

Also Exhibit "A."

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: April 21, 1958.

JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15993. United States Court of Appeals for the Ninth Circuit. Gertrude L. Brawner, Appellant, vs. Pearl Assurance Company, Ltd., et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 22, 1958.

Docketed: April 24, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 15993

GERTRUDE L. BRAWNER,

Plaintiff and Appellant,

vs.

PEARL ASSURANCE COMPANY, LIMITED, a Corporation,

Defendant and Appellee.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL AND DESIGNATION OF RECORD TO BE PRINTED

To the Honorable Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to Angus C. McBain and McBain and Morgan, Attorneys for Appellee:

Now comes Gertrude L. Brawner, the appellant above named, and files this statement of points upon which she intends to rely on the appeal herein, and makes the following designation of the record which she thinks necessary for the consideration thereof:

Points

I.

(a) The pleadings establish without conflict that plaintiff, on February 4, 1957, was the owner of certain improved real property.

(b) That said premises were insured by a fire policy for benefit of plaintiff, issued by defendants which at all times mentioned herein was in good standing and in full force and effect.

(c) That the insured premises were destroyed by fire on February 4, 1957.

(d) That demand for payment of loss sustained was duly made by plaintiff insured.

(e) That plaintiff at all times complied with and performed all of the terms and conditions of said insurance policy on her part required to be performed.

(f) That insured plaintiff, Gertrude L. Brawner, is entitled to judgment against defendant, Pearl Assurance Company, Limited, a corporation, under the terms of their said fire insurance policy as issued by them.

II.

(a) That the loss of plaintiff-owner insured, Gertrude L. Brawner, became a fixed liability fastened on insurer, Pearl Assurance Company, Limited, a corporation, under their said policy at the time of the destruction of the insured property by fire on February 4, 1957, and must be computed as of said date and insurer cannot escape its liability by reason of uncertain subsequent events which may or may not lead to a change of ownership.

(b) That a change of interest in said insured property after the occurrence of an injury which

results in a loss, does not affect the right of the insured to recover for the loss and will not enable the insurer to avoid its liability assumed under its policy.

III.

That the Findings of Fact of the trial court on Motion for Summary Judgment do not support the Conclusions of Law or the Judgment herein, but that upon said Findings of Fact appellant is entitled to Judgment as a matter of law.

Designation

Appellant believes that, for a proper consideration of the foregoing points, the entire record is necessary, and accordingly designates the whole thereof for printing.

Dated at Los Angeles, California, this 4th day of April, 1958.

WILLIAM H. BRAWNER, and
ERNEST W. PITNEY,

By /s/ WILLIAM H. BRAWNER,
Attorneys for Appellant,
Gertrude L. Brawner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 28, 1958.

No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellees.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

WILLIAM H. BRAWNER and
ERNEST W. PITTEY,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellant.

FILED

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171

TOPICAL INDEX

PAGE

I.

Jurisdiction of the District Court 1

II.

Jurisdiction of the Circuit Court of Appeals 2

III.

Statement of the case 2

IV.

Summary of appellant's argument 5

V.

Specification of error 5

VI.

Summary of the evidence 6

VII.

Issue involved 6

Conclusion 19

TABLE OF AUTHORITIES CITED

CASES — PAGE

Alexandra Restaurant, Inc. v. New Hampshire Insurance Co. of Manchester, 272 App. Div. 346, 71 N. Y. S. 2d 515 12

Bensley v. Mountain Lake Water Co., 13 Cal. 306 16

Detroit Fire & Marine Ins. Co. v. Boren-Stewart Co., 203 S. W. 382 10

Dubin Paper Co. v. Insurance Co. of North American, 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393 13, 17, 18, 19

Flood Control District v. Andrews, 52 Cal. App. 788 15

Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664 12, 18

Fort v. Globe & Rutgers Fire Ins. Co., 102 Misc. 584, 169 N. Y. Supp. 229; affd., 186 App. Div. 185, 173 N. Y. Supp. 595; App. Dismd., 227 N. Y. 581, 125 N. E. 918 11, 14

Foster v. Equitable Mutual Insurance Company, 2 Gray 216, 68 Mass. 216 12

Frank Vierneisel, et al. v. Rhode Island Insurance Company, 77 Cal. App. 2d 229 8

Godwin v. Iowa State Ins. Co. of Keokuk, 27 S. W. 2d 464 10

Hartford Fire Ins. Co. v. Doll, 23 F. 2d 443, 56 A. L. R. 1059 10

Heidisch v. Globe & Republic Ins. Co. of America, 368 Pa. 602, 84 A. 2d 566, 29 A. L. R. 2d 884 13

Iowa State Ins. Co. of Keokuk, v. Godwin, 51 S. Ct. 83, 282 U. S. 880, 75 L. Ed. 777 10

John Weise, Inc. v. Notie Redd, 22 Tenn. App. 90 7

Los Altos School Dist. v. Watson, 133 Cal. App. 2d 447 16

Pink v. Smith, 281 Mich. 107, 274 N. W. 727 13

Reed v. Lukens, 44 Pa. 200 17

Rosenbloom v. Maryland Ins. Co., 258 App. Div. 14, 15 N. Y. S. 2d 304 11, 12, 14

Russekov v. McCarthy Co., 206 Cal. 682 16

PAGE

Savarese v. Ohio Farmers' Ins. Co., 260 N. Y. 45, 182 N. E. 665, 91 A. L. R. 1341 12

State Mutual Fire Insurance Co. v. Updegraff, 21 Pa. 513 17

Tiemann v. Citizens' Insurance Co., 76 App. Div. 5, 78 N. Y. Supp. 620 12

Vyn v. Northwest Casualty Co., 47 Cal. 2d 89 7

Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503 12

STATUTES

Civil Code, Sec. 1249 13, 15

Civil Code, Sec. 1253 13, 15, 16

Insurance Code, Sec. 250 7

Insurance Code, Sec. 281 7

Insurance Code, Sec. 301 8

Insurance Code, Sec. 2051 7

United States Code Annotated, Title 28, Sec. 1291 2

United States Code Annotated, Title 28, Sec. 1441 2

TEXTBOOK

14 Ruling Case Law, Sec. 535, p. 1365 7

No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellees.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

I.

Jurisdiction of the District Court.

This is an appeal from a Summary Judgment of the United States District Court for the Southern District of California, Central Division, as follows:

(1) The Judgment on Motion for Summary Judgment in favor of the defendant, Pearl Assurance Company, Limited, a corporation.

(2) From the Judgment denying Motion for Summary Judgment of plaintiff, Gertrude L. Brawner, for the sum of $7,500.00 fire loss and the sum of $150.00 loss of rentals under Defendant's policy of insurance, and

(3) From the whole of the Final Judgment entered in this action on the 26th day of February, 1958.

The above-entitled cause is a civil action originally filed in Los Angeles Superior Court. The District Court of the United States has original jurisdiction in that the Plaintiff was, at the commencement of this action, and ever since has been and now is a citizen of the State of California, and that Defendant, Pearl Assurance Company, Limited, a corporation, is a corporation organized and existing under and by virtue of the laws of England in the Kingdom of Great Britain, with its principal place of business in the City of London and a non-resident of the State of California. [Tr. pp. 3-6.]

That the amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

That a proper bond for removal has been filed [Tr. p. 17; 28 U. S. C. A., Sec. 1441.]

II.

Jurisdiction of the Circuit Court of Appeals.

This Honorable Court has jurisdiction to review the Summary Judgment rendered by the District Court in favor of Appellee, Pearl Assurance Company, Ltd., under the provisions of 28 U. S. C. A., Section 1291.

III.

Statement of the Case.

Appellee, Pearl Assurance Company, Limited, a corporation, on October 2, 1955, for value received, duly issued its policy of Fire Insurance No. D1152238 in the California Standard Form prescribed, for fire insurance policies by laws of the State of California, insuring said plaintiff, Gertrude L. Brawner, against loss by fire to the building situate at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California, and against loss of rentals. [Tr. p. 12, lines 6-19.]

Said property was destroyed by fire on February 4, 1957. [Tr. p. 10.]

Appellee, Pearl Assurance Company, Limited, a corporation, policy No. D1152238 was in full force and effect at the time said building was destroyed. [Tr. pp. 18-19.]

The insured, Gertrude L. Brawner, duly reported the occurrence of said fire and the destruction of the building to said insurance company and demanded payment of the full amount of insurance on the building with legal interest thereon and of the sum of $150.00 loss of rentals. [Tr. pp. 19-20.]

The insured, Gertrude L. Brawner, was the owner in fee simple and in possession of said insured property on said February 4, 1957, and continued as such until April 12, 1957. The loss sustained by the fire became payable to the insured legal owner, Gertrude L. Brawner, at the time the fire occurred. That by reason of said fire and the destruction of said insured property, plaintiff Gertrude L. Brawner became entitled to payment for the loss sustained, to wit, the sum of $7,500.00 plus the sum of $150.00 per (64) loss of rentals. [Tr. p. 20.]

At the time said insured property was destroyed the entire property at the above-mentioned address was being condemned by the County of Los Angeles, a political subdivision of the State of California, in case No. 658447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, *et al.,* in the Superior Court of the State of California, in and for the County of Los Angeles. That at the time of said fire the said County of Los Angeles had not taken possession of said property and no judgment of condemnation had been entered on said property and no award of any kind had been made by said condemning body to Gertrude L. Brawner.

Subsequent to the loss sustained by said plaintiff and on April 5, 1957, judgment by stipulation [Tr. pp. 26-37] was entered between the County of Los Angeles and said Gertrude L. Brawner for the then value of said property, to wit, the sum of $26,400.00. Thereafter and on the 12th day of April, 1957, payment was made by said County of Los Angeles to said Gertrude L. Brawner of the amount of said interlocutory judgment and the fee title transferred by said Gertrude L. Brawner to the County of Los Angeles pursuant to law.

Said condemnation action entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, *et al.,* Los Angeles Superior Court case No. 658447 was not brought to trial within one (1) year from date of filing said action. [Tr. p. 26.] Appellee was not a party to said action and the County of Los Angeles, plaintiff in said condemnation action, is not a party herein.

A stipulation entered into by and between plaintiff and Gertrude L. Brawner in said condemnation action No. 658447 relates only to the real property and the then existing improvements. (65) It does not relate to nor purport to relate to the non-existing improvements theretofore destroyed by fire.

Defendant admits liability to the insured Gertrude L. Brawner as legal owner as of the date of the fire, to wit, February 4, 1957, with an insurable interest therein for loss of rentals under said policy. [Tr. p. 20.]

Plaintiff, Gertrude L. Brawner, sustained loss by reason of the destruction of said building in the sum of $7,500.00 and of rentals in the sum of $150.00.

Appellee admits liability for loss of rentals but denies liability for loss of buildings insured under their policy.

Motions for Summary Judgment were filed by both plaintiff [Tr. p. 24] and defendant. [Tr. p. 22.] On February 26, 1958 the District Court made its Findings of Fact, Conclusions of Law and Judgment denying plaintiff's motion for Summary Judgment and granting defendant's motion for Summary Judgment. [Tr. p. 53.] Thereupon, within time allowed by law, this appeal followed. [Tr. p. 55.]

IV.
Summary of Appellant's Argument.

The issue involved in this appeal is:

Does the fee simple owner of real property which is under pending condemnation action by eminent domain in the California Superior Court under which no evaluation or awards have been made and title to which has not yet passed to Condemnor, have an insurable interest in the property entitling him to compensation under a contract of insurance upon the loss of the building by fire?

It is appellant's position that this issue must be answered in the affirmative under the laws of the State of California and that the judgment herein to the contrary is erroneous.

V.
Specification of Error.

Appellant hereby makes the following specifications of error: that the Findings of Fact of the trial court on Motion for Summary Judgment do not support the Conclusions of Law or the Judgment, but that upon said Findings of Fact appellant is entitled to Judgment as a matter of law; that the evidence is insufficient to sustain the Findings of Fact, Conclusions of Law and Judgment.

VI.
Summary of the Evidence.

There is apparently no substantial conflict in the evidence in this matter which is a Motion for Summary Judgment by each of the parties on affidavits of the parties [Tr. p. 3], the facts being as set out herein under appellant's Statement of Case.

The motions for Summary Judgment were heard before the Honorable Harry C. Westover, Judge presiding, sitting without a jury and on February 17, 1958, the Court denied appellant Gertrude L. Brawner's Motion [Tr. 39] and thereafter made its Findings of Fact, Conclusions of law and Judgment in favor of Appellee, Pearl Assurance Company, Ltd. [Tr. pp. 49-54.] In due course, this appeal from said Judgment followed.

VII.
Issue Involved.

The issue involved in this appeal is: Does the fee simple owner of real property which is under pending condemnation action by eminent domain, in the Superior Court of the State of California, under which no evaluation or awards have been made and title to which has not yet passed to Condemnor, have an insurable interest in the property entitling her to compensation under a contract of insurance upon the loss of the building by fire?

(a) The loss of plaintiff owner insured, Gertrude L. Brawner, became a fixed liability fastened on insurer, Pearl Assurance Company, Limited, a corporation, under their said policy at the time of the destruction of the insured property by fire on February 4, 1957, and must be computed as of said date and insurer cannot escape

its liability by reason of uncertain subsequent events which may or may not lead to a change of ownership.

(b) A change of interest in said insured property after the occurrence of an injury which results in a loss, does not affect the right of the insured to recover for the loss and will not enable the insurer to avoid its liability assumed under its policy.

A contract of insurance is purely a personal contract between the insured and the insurance company.

14 R. C. L. 1365, Sec. 535;

John Weise, Inc. v. Notie Redd, 22 Tenn. App. 90;

Vyn v. Northwest Casualty Co., 47 Cal. 2d 89.

California Insurance Code, Section 250, provides:

"Except as provided in this article any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code."

California Insurance Code, Section 2051, provides:

"Measure of Indemnity under open policy:

"Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire." (60)

California Insurance Code, Section 281, provides:

"Every interest in property, or any relation thereto or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

California Insurance Code, Section 301, provides:

> "A change of interest in a subject insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnify for the loss."

In the matter of *Frank Vierneisel, et al. v. Rhode Island Insurance Company,* 77 Cal. App. 2d 229 at 231, the Court had before it the matter of loss by fire and right of legal owners to recover for loss by fire on property which was in escrow with sale pending and possible transfer of title contemplated, the Court said:

> "(1) First: Were the Ferreros the legal owners of the premises on the date of the fire?
>
> This question must be answered in the affirmative. The property was destroyed on June 29, 1944. The escrow had been opened for the sale of the property to plaintiffs on the day before, June 28, 1944. However, the deed was not delivered to plaintiffs until October 27, 1944.
>
> "It is the general rule that where conditions fixed for delivery of a deed are not such as are certain to happen, merely depositing the deed with an escrow holder does not pass title to the grantee. (*Holman v. Toten,* 54 Cal. App. 2d 309, 313 (128 P. 2d 808), and cases cited therein.)
>
> "In the present case the conditions of the escrow were not certain to happen and title did not pass until plaintiffs had complied with the conditions of the escrow and were entitled to receive the deed. Therefore on the date of the fire the Ferreros were the legal owners of the property which was destroyed. . . . For a case based on facts similar to those in the present case and holding that the right to recover on a fire insurance policy is not forfeited be-

cause a deed is placed in escrow awaiting performance of conditions precedent to the delivery thereof to the vendee see *Pomeroy v. Aetna Insurance Co.,* 86 Kan. 214 (120 P. 344, Ann. Cas. 1913C, 170, 38 L. R. A. N. S. 142).

"It is settled that after a loss has arisen liability is fastened upon the insurer and any right of the insured as a result of the loss may be assigned with or without the consent of the insurer. (*Ocean Acc. etc. Corp. v. Southern Bell Telephone Co.* (Western Dist. of Mo.), 100 F. 2d 441, 444; *Davies v. Maryland Casualty Co.,* 89 Wash. 571 (154 P. 1116, 155 P. 1035, L. R. A. 1916D, 395).) In the present case the loss occurred on June 29, 1944, and the assignment was not made by the Ferreros to plaintiffs until October 6, 1944.

"(3) Third: Were the Ferreros the sole and unconditional owners of the destroyed property on June 29, 1944, the date of the fire?

"This question must be answered in the affirmative. An option to purchase does not vest such an interest in the optionee as to void an insurance policy which provides that it shall be void in case of a change in interest, title or possession with the consent of the insured. (*Mackintosh v. Agricultural Fire Ins. Co.,* 150 Cal. 440, 442 et seq. (89 P. 102, 119 Am. St. Rep. 234).)

"*Brickell v. Atlas Assurance Co., Ltd.,* 10 Cal. App. 17 (101 P. 16), is factually distinguishable from the present case. In the cited case the insured had entered into an agreement for the sale of his property, the purchase price was to be paid in installments and the purchaser had the right of possession. In such case the vendor did not have an absolute title, the equitable title being vested in the purchaser. At the time of the fire in the present

> case the plaintiff held merely the right to complete the terms of the escrow and thus become entitled to acquire the property. Therefore the instant case falls under the rule announced by our Supreme Court in *Mackintosh v. Agricultural Fire Ins. Co., supra.*"

Speculative collateral questions should not be allowed to enter into the ascertainment of actual value so insurer's liability is not affected by the fact that the insured had offered to sell the property for less than its actual value. The fact that the amount of loss cannot be determined without difficulty, or is to some extent a matter of estimate, does not affect insurer's liability or insured's right to compensation.

> *Godwin v. Iowa State Ins. Co. of Keokuk* (Iowa App.), 27 S. W. 2d 464, cert. den. *Iowa State Ins. Co. of Keokuk, Iowa, v. Godwin,* 51 S. Ct. 83, 282 U. S. 880, 75 L. Ed. 777;
>
> *Detroit Fire & Marine Ins. Co. v. Boren-Stewart Co.* (Civ. App.), 203 S. W. 382;
>
> *Hartford Fire Ins. Co. v. Doll* (C. C. A. Ind.), 23 F. 2d 443, 56 A. L. R. 1059.

Measure of Indemnity under open policy. Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire.

In an action to recover on an insurance policy covering a building which was destroyed by fire where the insurance company claimed that the policy was forfeited because of a change in the title, interest or possession of the property insured, through and resulting from an or-

der made by the commissioner on condemnation, such order having been made before the fire occurred, although the compensation had not been paid until several months after the fire, the court in *Fort v. Globe & Rutgers Fire Ins. Co.,* 102 Misc. 584, 169 N. Y. Supp. 229, affd. 186 App. Div. 185, 173 N. Y. Supp. 595, app. dismd. without op. 227 N. Y. 581, 125 N. E. 918, held that the title to the property at the time of the fire was the same as it was when the policy of insurance was issued, on the basis of a statute providing that title to property taken by the city would not pass until payment or deposit of the sum to be paid as compensation, the city in the instant case not being seized of the property or entitled to enter thereon until after the date of the fire.

Likewise, the plaintiff was allowed to recover under a policy insuring property from damage by fire, in *Rosenbloom v. Maryland Ins. Co.,* 258 App. Div. 14, 15 N. Y. S. 2d 304, where a municipal housing authority had contracted with the plaintiff for the purchase of the property, and had exercised its option to take the property by condemnation proceedings after the fire occurred, the court holding that the plaintiff was, at the time of the fire, the absolute and legal owner of the insured property, and that "his insurable interest was the full value of the insured building," since he would have had to bear the loss himself, but for the insurance. There was said to be nothing in the contract or in the relation of the parties between themselves or to the property which would provide a defense to the present action.

The fact that the building was subject to removal or was soon to have been removed does not affect the right

of insured to recover its value as a building from insurer, where it is destroyed before the time for removal.

Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503.

In the case of *Alexandra Restaurant, Inc. v. New Hampshire Insurance Co. of Manchester,* 272 App. Div. 346, 71 N. Y. S. 2d 515, a lessor had restored, under a lease, after a fire, improvements which the lessee had insured against loss by fire. The Supreme Court of New York, Appellate Division, held that, under the law of that State the fact that the lessor had restored the improvements did not affect the insurer's liability under its policy. In support of its decision, the court cited: *Foley v. Manufacturers' & Builders' Fire Ins. Co.,* 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664; *Savarese v. Ohio Farmers' Ins. Co.,* 260 N. Y. 45, 182 N. E. 665, 91 A. L R. 1341; *Tiemann v. Citizens' Insurance Co.,* 76 App. Div. 5, 78 N. Y. Supp. 620; *Rosenbloom v. Maryland Insurance Co.,* 258 App. Div. 14, 15 N. Y. S. 2d 304. The rulings in those cases are discussed in the opinion. The *Alexandra Restaurant* case was affirmed by the Court of Appeals of New York, 297 N. Y. 853, 79 N. E. 2d 268. It is apparent that, under the law of New York, the rights of an insurer and the insured under a fire insurance policy are established as of the time of the fire and loss, and that the fact that the insured has ultimately recouped his loss from another source does not relieve the insurer of its liability.

In *Foster v. Equitable Mutual Insurance Company,* 2 Gray 216, 68 Mass. 216, it was held that a mortgagee's right to recover on a fire insurance policy upon his interest in the mortgaged property was not affected by the repair of the loss by the owner of the equity of redemp-

tion. The Supreme Court of Massachusetts said, at pages 220-221 of 68 Mass.:

> ". . . The plaintiffs had an insurable interest in the property; the defendants agreed to insure it against a loss by fire; and a loss has occurred. The contingency contemplated by the contract has therefore arisen, and the defendants are bound to pay the amount of the damage. It is wholly immaterial to them, and constitutes no valid defense to this suit, that the property has been since repaired."

See also:

Pink v. Smith, 281 Mich. 107, 274 N. W. 727;

Dubin Paper Co. v. Insurance Co. of North America, 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393;

Heidisch v. Globe & Republic Ins. Co. of America, 368 Pa. 602, 84 A. 2d 566, 29 A. L. R. 2d 884.

Under California ~~Civil Code~~ Code of Civil Procedure, Sections 1249 and 1253, the only property taken under the condemnation proceedings is that *actually taken* at the time the condemnor takes possession. Title is acquired under the above-cited code section only when payment has been made by the condemnor and order entered, in this case, April 29, 1957.

Title to the property remained in plaintiff until the County paid the amount of the stipulated judgment on April 12, 1957. Defendants apparently argue that this is a mere paper title to secure payment of the award and is not such a title as to constitute an insurable interest. It is further argued that plaintiff has suffered no economic loss and cannot recover for that reason. These arguments are not sound and must be rejected.

In an action to recover on an insurance policy covering a building which was destroyed by fire where the

insurance company claimed that the policy was forfeited because of a change in the title, interest or possession of the property insured, through and resulting from an order made by the commissioners on condemnation, such order having been made before the fire occurred, although the compensation had not been paid until several months after the fire, the court in *Fort v. Globe & Rutgers Fire Ins. Co.,* 102 Misc. 584, 169 N. Y. Supp. 229, affd. 186 App. Div. 185, 173 N. Y. Supp. 595, app. dismd. without op. 227 N. Y. 581, 125 N. E. 918, held that the title to the property at the time of the fire was the same as it was when the policy of insurance was issued, on the basis of a statute providing that title to property taken by the city would not pass until payment or deposit of the sum to be paid as compensation, the city in the instant case not being seized of the property or entitled to enter thereon until after the date of the fire.

Likewise, the plaintiff was allowed to recover under a policy insuring property from damage by fire, in *Rosenbloom v. Maryland Ins. Co.,* 258 App. Div. 14, 15 N. Y. S. 2d 304, where a municipal housing authority had contracted with the plaintiff for the purchase of the property, and had exercised its option to take the property by condemnation proceedings after the fire occurred, the court holding that the plaintiff was, at the time of the fire, the absolute and legal owner of the insured property, and that "his insurable interest was the full value of the insured building," since he would have had to bear the loss himself, but for the insurance. There was said to be nothing in the contract or in the relation of the parties between themselves or to the property which would provide a defense to the present action.

Under California Code of Civil Procedure, Sections 1249 and 1253, the only property taken under the condemnation proceedings is that *actually taken* at the time the condemnor takes possession. Possession is acquired under the above-cited code sections only when payment has been made by the condemnor and order entered, in this case, April 12, 1957.

An analogous situation to the one presented here involves the taking under condemnation proceedings of leasehold interests and improvements made thereunder in *Flood Control District v. Andrews,* 52 Cal. App. 788 at 794, wherein the court held:

> "Appellant contends that its right to the damages in question is established by the fact that its leasehold was interrupted, in contemplation of law, on March 20, 1919, the date when summons was issued; but the rule that damages are to be assessed in condemnation cases as of the date of the issuance of summons relates only to *property actually taken.* An anomalous and unbearable condition would be presented if, under that rule, the public could be required to pay for a leasehold interest not taken, but which the lessee held unmolested to the end of the term, or for the cost of the removal of structures which the lessee must have removed before the expiration of the term, or must have lost altogether. Fortunately, such a condition does not exist under the law (Schreiber v. Chicago & E. R. Co., 115 Ill. 340 (3 N. E. 427))."

California Code of Civil Procedure, Section 1253, determines the time when title vests in the condemnor as follows:

> "§1253. Final order of condemnation, what to contain: When filed, title vests. *When payments*

> *have been made* and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

Bensley v. Mountain Lake Water Co., 13 Cal. 306;

Russekov v. McCarthy Co., 206 Cal. 682, 687;

Los Altos School Dist. v. Watson, 133 Cal. App. 2d 447 at 450.

Condemnor cannot acquire title until after rendition of judgment determining right to condemn and fixing amount of compensation to be paid and thereafter not until payments have been made and final order of condemnation has been filed in the office of the County Recorder.

Los Altos Sch. Dist. v. Watson, 133 Cal. App. 2d 447.

Title to the property remained in plaintiff until the County paid the amount of the stipulated judgment on April 12, 1957, and until final order was made and entered on April 29, 1957, pursuant to Code of Civil Procedure, Section 1253. Defendants apparently argue that this is a mere paper title to secure payment of the award and is not such a title as to constitute an insurable interest. It is further argued that plaintiff has suffered no economic loss and cannot recover for that reason. These arguments are not sound and must be rejected.

This case is analogous to the situation where the insured enters into an agreement to sell the premises and

after the signing of the agreement but prior to the passage of title a fire occurs. There, as here, the insured holds title as security for the purchase price. In that situation it has been repeatedly held that the vendor possesses an insurable interest.

The following cases, to wit: *Dubin Paper Co. v. Ins. Co. of N. America,* 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393; *State Mutual Fire Insurance Co. v. Updegraff,* 21 Pa. 513, and *Reed v. Lukens,* 44 Pa. 200, hold that the person possessed of the legal title has an insurable interest and the insurance company is liable to him under the terms of the policy. In each of those cases it was further held that the holder of the legal title was a trustee of the funds thus received for the purchaser or equitable owner. The application of this latter rule to these facts cannot be decided here, however, because the purchaser (condemnor) has not been made a party to these proceedings. The pertinent point is that defendant may not set up the equitable ownership in another as a defense to a suit on its contract with plaintiff. The rule is stated in *Reed v. Lukens, supra,* 44 Pa. at page 202: "The insurance company, however, became liable to pay for the loss to the (insured), because . . . he, as respects third persons, not privy to the contract of sale, is still to be regarded as the owner of the property." Legal title being in plaintiffs, they had an insurable interest and are entitled to recover from defendant for the loss incurred as a result of the fire.

Defendant argues that plaintiff suffered no loss by the fire; that the amount of the award by the county was in no way affected by the fire and further that the county gained by the fire since it saved money by not having to

raze the building. *Dubin Paper Co. v. Ins. Co. of N. America, supra,* supplies the complete answer to this argument. There, the insurance company likewise argues that (361 Pa. at 82, 63 A. 2d at 92):

> "Unless the insured has sustained an actual monetary loss, the insurer has no liability."

We answered that by saying:

> "The error in this argument is in the defendants' interpretation of the word 'loss' . . . the insurance company gives the insured the equivalent in money of the building loss by fire. The 'loss' which the insurance company contracted to pay to the owner of the building in the event of its destruction by fire is the actual worth in money of that building before it was destroyed."

The rule is stated in 361 Pa. at 91, 63 A. 2d at 96:

> "The loss the company contracts to remedy is the fire-created depletion of the insured's assets, and that is made up not by the erection of a duplicate of the building destroyed but by paying the insured its value in money. This liability the insuring companies cannot escape by anything any third party may later do for the insured's benefit."

See also

> *Foley et al. v. Manufacturers' & Builders' Fire Ins. Co. of New York,* 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664.

Thus, the fact that plaintiffs were paid the full amount of the award by the County and suffered no monetary loss as a result of the fire is no defense to this suit. We can conceive of many instances where the insured might suffer no out-of-pocket loss, some of which are set forth

very clearly in the *Dubin* case, but that fact does not defeat his right to recover. Nor does the fact that the County gained by the fire affect the result. Conceivably that might have some bearing in an action between plaintiff and the County but certainly in a suit between insured and insurer that information is wholly irrelevant.

The existence of the contract of insurance and the occurrence of the fire are admitted. Legal title in plaintiff cannot be denied. Defendants are, therefore, liable under the terms of their contract.

Conclusion.

Appellant Gertrude L. Brawner respectfully submits that the Summary Judgment in favor of Appellee, Pearl Assurance Company, Limited, a corporation, is erroneous and should be reversed and that the trial court be instructed to enter Judgment in favor of Gertrude L. Brawner.

Respectfully submitted,

WILLIAM H. BRAWNER and
ERNEST W. PITNEY,
By WILLIAM H. BRAWNER,
Attorneys for Appellant.

No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

FILED
JUL 26 1958
PAUL P. O'BRIEN, CLERK

ANGUS C. McBAIN,
McBAIN & MORGAN,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Introductory 1

II.

As to Chapters I and II of appellant's opening brief—jurisdiction 1

III.

As to Chapter III of appellant's opening brief—statement of the case 2

IV.

As to Chapters IV, V and VI of appellant's opening brief..... 6

V.

As to Chapter VII of appellant's opening brief—issues involved 6

VI.

The District Court's orders and judgment are consistent with California law and supported by sound decisions..... 9

A. A review of pertinent California law..... 9

B. Attitude of federal courts when state law in doubt..... 11

C. The law in support of the District Court's judgment..... 11

D. There was no genuine dispute in material fact before the District Court 18

E. Appellant's motion for summary judgment was properly denied 19

Conclusion 21

Appendix:

Affidavit of Angus C. McBain in opposition to plaintiff's motion for summary judgment.....App. p. 1

TABLE OF AUTHORITIES CITED

CASES PAGE

Alexandra Restaurant, Inc. v. New Hampshire Insurance Co., 273 App. Div. 436, 71 N. Y. S. 2d 515 8, 13

Beman v. Springfield F. & M. Ins. Co., 303 Ill. App. 554, 25 N. E. 2d 603 17

Buder v. Becker, 185 F. 2d 311 11

Citizens Insurance Company v. Foxbilt, Inc., 226 F. 2d 641 11, 17

Draper v. Delaware, etc., 91 Atl. 206 17

Foley, et al. v. Manufacturers' and Builders' Fire Insurance Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664 13

Gifford v. Travelers Protective Association, 153 F. 2d 209 18

Larner v. Commercial Union Assur. Co., 127 Misc. 1, 215 N. Y. Supp. 151 17

Lorentz v. RKO Radio Pictures, 155 F. 2d 84, cert. den., 67 S. Ct. 81, 329 U. S. 727, 91 L. Ed. 629 19

Marshall Spinning Co. v. Travelers Fire Ins. Co., 325 Pa. 135, 188 Atl. 839 17

Palatine Insurance Co. v. O'Brien, 107 Md. 341, 68 Atl. 484 18

People of the State of California v. United States, 235 F. 2d 647 11

Ramsdell v. Insurance Co., 197 Wis. 136, 221 N. W. 654 17

Schultz, etc. v. Home Insurance Co., 205 Ill. App. 297 17

Tauriello v. Aetna Insurance Co., 82 A. 2d 226 15, 17

Vierneisel v. Rhode Island Insurance Co., 77 Cal. App. 2d 229 8

Whitney Estate Co. v. Northern Assurance Co., 155 Cal. 521, 101 Pac. 911, 18 Ann. Cas. 512, 23 L. R. A. 123 10

RULES PAGE

Federal Rules of Civil Procedure, Rule 56(b) (28 U.S.C.A.) 18

STATUTES

Insurance Code, Sec. 250 9
Insurance Code, Sec. 301 9
Insurance Code, Sec. 2051 8, 10
Insurance Code, Sec. 2070 2
Insurance Code, Sec. 2071 2

TEXTBOOKS

1 Cooley's Briefs on Insurance (2d Ed.), p. 6 18
45 Corpus Juris Secundum, Sec. 915, p. 1010 7

No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

I.
Introductory.

For consistency appellee, Pearl Assurance Company, Limited, will respond to Appellant's Opening Brief in the order in which it is presented. In the belief that appellant has failed to meet squarely the real ground for the Honorable District Court Judge's judgment, appellee will conclude its brief with an analysis of this neglected ground.

II.
As to Chapters I and II of Appellant's Opening Brief —Jurisdiction.

Appellee agrees with appellant that the District Court of the United States had jurisdiction of this cause on the ground of diversity of citizenship and that this Honorable United States Court of Appeals has jurisdiction to review the judgment of the District Court.

III.

As to Chapter III of Appellant's Opening Brief—Statement of the Case.

Since appellant has stated some conclusions and argument as facts in this chapter of her opening brief, appellee feels constrained to briefly restate the case as follows:

The appellant prosecutes this appeal from the action of the District Court in denying her motion for summary judgment and granting appellee's motion for summary judgment and entering judgment denying appellant-insured recovery under a policy of fire insurance. Appellee issued the policy to appellant October 22, 1955, for a term of three years in the form prescribed by California Insurance Code, Sections 2070 and 2071, and by its terms undertook to insure appellant against loss by fire to a building situate at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California [Tr. pp. 12-16, incl., and p. 18, par. I of Answer]. Certain rental insurance was also provided by the policy.

On February 7, 1957, a fire occurred which appellant alleges destroyed the insured building. Appellant reported the fire and demanded payment of $7,500.00, the limit of insurance on the building, plus $150.00 loss of rentals from the building [Tr. p. 50, par. II of Fdgs.]. Appellee rejected the claim for the alleged destruction of the building in its entirety. However, appellee admitted liability for and tendered payment of the loss of rentals and the rental claim has been paid by appellee and accepted by appellant since the filing of this appeal [Tr. p. 19, par III; p. 20, Par. IV].

Amongst grounds for denial of the claim involving the building, appellee pleaded affirmatively in its answer to the effect that appellant had suffered no loss because appellant's entire property at the Bunker Hill address, including the insured building, was in process of being condemned by the County of Los Angeles in an action in eminent domain pending at the time of the fire and soon after the fire the condemnation was completed by judgment and by condemnor's payment to appellant in accordance with the judgment of the full value of the property in its condition before the fire without diminution because of physical damage caused by the fire [Tr. p. 20, par. I].

The facts relating to appellee's defense are:

(a) At the time of the fire the whole of appellant's said property was being condemned by the County of Los Angeles, a political subdivision of the State of California, in Case No. 658,477, filed April 4, 1956, in the Superior Court of the State of California, in and for the County of Los Angeles. (Conceded by appellant's own motion for summary judgment [Tr. p. 25, par. I]; also Appellee's Exhibit "A" on file in this proceeding; also appellee's motion for summary judgment [Tr. pp. 22-23].)

(b) At a pre-trial hearing in the District Court, there were introduced into evidence as one exhibit certified copies of three documents from the condemnation action, they being documents entitled "Statement of Issues Agreed Upon for Pre-Trial Conference," "Stipulation for Judgment" and "Interlocutory Judgment," respectively, all admittedly relating to the property at 125-127-127½ South Bunker Hill Avenue [see original of Appellee's Ex. "A" on file in these proceedings]. In the document entitled "Statement of Issues," etc., and signed by the parties

Feb. 15, 1957, it was stipulated by the condemnor and the appellant herein in part as follows:

> ". . . it is agreed by and between . . . attorneys for plaintiff, County of Los Angeles, and . . . attorney for defendant, Gertrude L. Brawner, that the following matters are agreed upon and it will not be necessary to offer evidence in support thereof:
>
> * * * * * * * *
>
> 5. *That the date of valuation of the said property is April 4, 1956.*
>
> 6. *That the only issue not agreed upon is the market value of the said property as of April 4, 1956."* [Italics added for emphasis—see this document in Ex. "A," p. 1, lines 18-26; p. 2, lines 15-18.]

(c) Thereafter by the "Stipulation for Judgment" in the condemnation action, dated and signed March 26, 1957, it was agreed amongst other things:

> "It is hereby stipulated by and between plaintiff County of Los Angeles . . . and defendant Gertrude L. Brawner, . . . :
>
> "2. That the market value of said real property, together with any and all improvements thereon, including any and all severance damage which may be caused to other properties owned by said defendant by the taking thereof, is the sum of Twenty-Six Thousand Four Hundred Dollars ($26,400.00);
>
> "3. That the plaintiff may have an interlocutory judgment without further notice. . . ." [see p. 1, line 16, to p. 2, line 6 of document entitled "Stipulation for Judgment" in Ex. "A"].

(d) Thereafter on April 5, 1957, the Interlocutory Judgment was filed, in which it was provided in part:

> "2. That the market value of said real property, together with any and all improvements thereon, in-

cluding any and all severance damage which may be caused to the remainder of the said real property by the taking thereof is the sum of TWENTY-SIX THOUSAND FOUR HUNDRED DOLLARS ($26,400.00);" [see Ex. "A"].

(e) The decree then provided for the payment of the indicated sum to appellant herein and for the transfer of title to the County of Los Angeles. This sum was paid by the County to appellant herein April 12, 1957 [Tr. p. 33, second par., affidavit of appellant's counsel].

Following the filing of Exhibit "A" in evidence, appellee made its Motion for Summary Judgment on the ground that its defense was established by said exhibit and there was no genuine issue as to any material fact [see Motion, Tr. pp. 22-23]. The District Court granted the Motion, made Findings of Fact and Conclusions of Law accordingly [Tr. pp. 49-53] and gave judgment to appellee [Tr. pp. 53-54]. In Paragraph IV of its Findings of Fact the District Court found in some detail that appellee's defense as above outlined was true [Tr. p. 51].

Appellant's opposition to appellee's motion for summary judgment was, in substance, that the value agreed upon and decreed in the condemnation action was the value of the property at the time the judgment was entered and then only for the property actually taken by the condemnor [Tr. p. 42, subd. (d) of appellant's objections to findings proposed after motion for summary judgment]. The District Court found the records of the condemnation action to be contrary to this and refused to go behind the record.

IV.

As to Chapters IV, V and VI of Appellant's Opening Brief.

The summary of appellant's argument in Chapter IV of her brief suggests that appellant has either ignored or failed to grasp the true significance of appellee's first affirmative defense.

Appellee's precise position has always been and is now that its policy was an undertaking to indemnify appellant against loss actually sustained by her by reason of a fire to the property described in the policy and that because the fire which occurred did not cause her any loss, there was nothing to be indemnified. It is to be noted that the defense is not and never was predicated upon the theory that appellant had no insurable interest in the property at the time of the fire [see Appellant's Answer, Tr. pp. 18-21, particularly p. 20].

Chapters V and VI of Appellant's Opening Brief, being statements of appellant's position, require no comment.

V.

As to Chapter VII of Appellant's Opening Brief—Issues Involved:

Throughout this chapter, appellant argues the proposition that appellant had an insurable interest in the involved property at the time of the fire. No doubt appellant has been prompted to make this argument by a phrase in the District Court's Findings of Fact to the effect that appellant "had no insurable interest in the building at the time of its destruction" [Tr. p. 51, 1st par. of Par. IV]. The phrase in question is probably misleading when taken out of context. The District Court probably adopted it in

reference to the fact that appellant had sustained no loss, and not in reference to the proposition that appellant had no tangible insurable interest. Appellee's defense was and is in relation to the absence of a loss to be indemnified and it would appear logical that the District Court's use of this wording was in relation to the issues raised by the pleadings.

Appellee has no quarrel with the general principle that under ordinary circumstances liability for loss must be determined as of the time of the fire and that after-events such as change of ownership or interest will not alter the liability. These principles originate in cases dealing with the existence or the extent of any insurable interest at the time of the fire. In resolving such questions, the ownership and interest at the time of the fire must be held controlling, but it is submitted these principles do not change the established and salutary rule upon which appellee relies, which is cogently stated in 45 *Corpus Juris Secundum,* p. 1010, Section 915, as follows:

> "Since a contract for insurance against fire ordinarily is a contract of indemnity, as discussed supra Section 14, insured is entitled to receive the sum necessary to indemnify him, or to be put, as far as practicable, in the same condition pecuniarily in which he would have been had there been no fire; that is, he may recover to the extent of his loss occasioned by the fire, but no more, and he cannot recover if he has sustained no loss."

On page 7 of her brief, appellant recognizes the rule that contracts of insurance such as fire insurance policies are personal contracts and constitute an undertaking to indemnify the insured against a loss which he suffers.

Unfortunately, appellant abandons the subject at this point and digresses to cite some cases dealing with insurable interests. Thus, appellant quotes at length from *Vierneisel v. Rhode Island Insurance Co.*, 77 Cal. App. 2d 229. Actually this case involves a mere determination whether title had passed through escrow at the time of the fire and whether an assignment executed with respect to the policy affected its validity. Finally, the Court at page 233 appears to recognize that the insured must suffer a pecuniary loss (as contended by appellee herein) and found on the facts of the case that the insureds had. The foregoing appears representative of appellant's citations except for several decisions headed by *Alexandra Restaurant, Inc. v. New Hampshire Insurance Co.*, 273 App. Div. 436, 71 N. Y. S. 2d 515, mentioned on pages 12 to 14 of appellant's brief. These cases will be specifically discussed under a section of appellee's brief to follow.

Commencing on page 10 of her Opening Brief, appellant discusses the measure of indemnity under open policies. It is submitted the underlying fallacy of appellant's argument is that the insured must suffer a loss before this measure applies. By the very wording of Section 2051 of the California Insurance Code it is necessary that the fire must create an "*expense to the insured of replacing the thing lost or injured in its condition* at the time of injury . . ." (Italics ours.) It is appellee's contention that appellant was not caused the expense of replacing the thing lost or injured.

VI.

The District Court's Orders and Judgment Are Consistent With California Law and Supported by Sound Decisions.

A. A Review of Pertinent California Law.

Neither party has been able to find a California decision directly in point. It should follow that this Honorable Court's consideration of the case should be limited to the question whether the District Court reached a permissible conclusion, not necessarily a correct one. If the question decided is a doubful one under California Law—one on which there can be justifiable differences of opinion—the judgment ought to be affirmed.

A consideration of pertinent California law shows that the orders and judgment of the District Court are not in opposition thereto.

For example, California Insurance Code, Section 250, to the effect that "Any contingent or unknown event, whether past or future *which may damnify a person having an insurable interest,* . . . may be insured against . . ." (Italics ours) suggests that three requisites should be present to constitute a loss, *i.e.,* an insurable interest, the occurrence of a contingent or unknown event, and the imposition of a loss upon the insured.

Section 301 of the same Code to the effect that "A change of interest in a subject insured after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss" suggests there must be a personal loss calling for indemnification.

Section 2051 of the same Code to the effect that under an open policy "the measure of indemnity in fire insurance is *the expense to the insured* of replacing any loss or injury . . ." (Italics ours) also suggests that insured must sustain a loss calling for indemnification.

The landmark case of *Whitney Estate Co. v. Northern Assurance Co.,* 155 Cal. 521 (101 Pac. 911, 18 Ann. Cas. 512, 23 L. R. A. 123), establishes the rules for California where it states, commencing at the foot of page 523 of the California Report:

> "In their briefs the learned counsel for the respective parties present various authorities, but none of the cases cited on either side can be said to be closely in point. They are valuable in so far as they illustrate general principles of insurance law which must be looked to for the determination of the question before us. One of these principles—and the one upon which the respondent bases its position—is that a policy of insurance is a contract of indemnity. It is, as defined in section 2527 of the Civil Code, 'a contract whereby one undertakes to indemnify another against loss, damage or liability, arising from an unknown or contingent event.' Section 2551 provides that 'the sole object of insurance is the indemnity of the insured . . .' Policies 'executed by way of gaming or wagering' are void. (Civ. Code, sec. 2558.) 'The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.' (Civ. Code, sec. 2550.) Accordingly, it is universally held that (except in case of a valued policy) 'the insured is entitled to recover under the policy only such loss as he has actually sustained, not exceeding the sum stipulated.' (16 Am. and Eng. Ency. of Law, p. 840.)"

B. Attitude of Federal Courts When State Law in Doubt.

The attitudes of the United States Courts of Appeals and of the United States Supreme Court are stated with complete clarity in the opinion in *Citizens Insurance Company v. Foxbilt, Inc.*, 226 F. 2d 641, discussed and quoted in the next section of this brief. As mentioned in that opinion the question for review is not whether the District Court reached a correct conclusion, but whether it reached a permissible one. If the question decided was doubtful under California law, the judgment must be affirmed.

The opinion of Justice Sanborn in *Buder v. Becker,* 185 F. 2d 311, is of interest, particularly because it discusses many decisions of the Eighth Circuit Court of Appeals and of the United States Supreme Court defining the province of the federal reviewing court in such circumstances.

The Honorable Court of Appeals which will review the matter at bar has indicated a like concept of the law in *People of the State of California v. United States* (decided 1956), 235 F. 2d 647.

It is submitted that the judgment of the District Court herein is not only consistent with but is literally in keeping with the fundamentals of California law last discussed.

C. The Law in Support of the District Court's Judgment.

Although the end result of the case was adverse to the insurance company, the opinion in *Citizens Insurance Company v. Foxbilt, Inc.* (8th Cir., 1955), 226 F. 2d 641, is strongly in point. The case involved a provision in a fire insurance policy insuring a lessee against loss caused

by fire to tenant's improvements and betterments in the leased premises. After the fire the lessor had repaired the damage at its own expense. The United States Court of Appeals affirmed the District Court's ruling allowing recovery to the insured, but appellee submits the opinion shows on its fact that a judgment for the insurance company also would have been affirmed. While the opinion should be read in full, appellee quotes from it as follows:

> "This Court is not an appellate court of the State of Iowa and establishes no rules of law for that State. The question for review in a case such as this is not whether the trial court has reached a correct conclusion, but whether it has reached a permissible one." (Citing many decisions by the same Court.)
>
> ". . . It is conceded that the Supreme Court of Iowa has not as yet decided the question which the District Court was called upon to decide. That it may be problematical whether the Iowa Supreme Court would reach the same conclusion in a similar case is of no help to the Insurance Company on this appeal. See Buder v. Becker, 8 Cir., 185 F. 2d 311, 315. If the question decided was a doubtful question of Iowa law as to which there can be a justifiable difference of opinion, the judgment must be affirmed.
>
> (2, 3) Under the law of Iowa, a fire insurance policy is a contract of indemnity by which the insurer agrees to indemnify the insured against loss or damage to the insured property by fire, not exceeding the amount of the insurance. (Citing cases.) Liability under the policy attaches on the happening of the loss. Washburn-Halligan Coffee Co. v. Merchants' Brick Mutual Fire Ins. Co., 110 Iowa 423, 81 N. W. 707, 708.

(4) The measure of damages under Iowa law, in the event of loss, is ordinarily the difference between the fair market value of the insured property immediately before the fire and its fair market value immediately thereafter, not exceeding the face amount of the policy nor the cost of repair and replacement. (Citing cases.)

(5) Since the liability of the insurer is for indemnity against loss to property and attaches on the happening of the loss and since the amount of the liability is determinable as of that time, it reasonably can be argued that the subsequent repair or restoration of the insured property by a third party without cost to the insured cannot relieve the insurer of its accrued liability. That is the law in some of the states."

After discussing cases such as those cited by appellant on pages 12 to 14 of her Opening Brief, in particular *Alexandra Restaurant, Inc. v. New Hampshire Insurance Co.*, 272 App. Div. 346, 71 N. Y. S. 2d 515, and *Foley, et al. v. Manufacturers' and Builders' Fire Insurance Co.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664, the reviewing court recognized the authorities and decisions relied upon by appellee herein when it said, commencing on page 644:

"There is, however, respectable authority opposed to what, for convenience, may be called the New York rule.

"In 44 C. J. S., Insurance, Sec. 224, p. 933, it is said:

" 'Fire insurance is a personal contract with insured, and not a contract in rem, its purpose being not to insure property against fire, but to insure the owner of the property against loss by fire.'

"In 45 C. J. S., Insurance, Sec. 915, p. 1010, the text reads as follows:

" 'Since a contract for insurance against fire ordinarily is a contract of indemnity, as discussed supra Sec. 14, insured is entitled to receive the sum necessary to indemnify him, or to be put, as far as practicable, in the same condition pecuniarily in which he would have been had there been no fire; that is he may recover to the extent of his loss occasioned by fire, but no more, and he cannot recover if he has sustained no loss.'

"In support of the last clause of the text, the following cases are cited in footnote 22, 45 C. J. S., p. 1010: Beman v. Springfield Fire & Marine Ins. Co., 303 Ill. App. 554, 25 N. E. 2d 603; Patterson v. Durand Farmers Mut. Fire Ins. Co., 303 Ill. App. 128, 24 N. E. 2d 740; Ramsdell v. Insurance Co. of North America, 197 Wis. 136, 221 N. W. 654; Schultz, for Use of Whitlock v. Home Ins. Co., 205 Ill. App. 297; Larner v. Commercial Union Assur. Co., Limited, of London, England, 127 Misc. 1, 215 N. Y. S. 151; Marshall Spinning Co. v. Travelers Fire Ins. Co., 325 Pa. 135, 188 A. 839. In the Ramsdell case, supra, the Supreme Court of Wisconsin held that no loss recoverable under a fire insurance policy was sustained by lessors of a building where it was restored by the lessee, who was also insured and who recovered for the loss from his insurer. In the Schultz case, supra, it was held that the owner of a building under construction, which was completed by the contractor after a fire loss, could not recover from the insurer, since the owner had sustained no pecuniary loss.

"Appelman, in Insurance Law and Practice, Vol. 6, Sec. 3861, pages 207-208, says:

"'. . . If the damaged property is restored or repaired by a mortgagor or lessee, neither the mortgagee (citing Friemansdorf v. Watertown Ins. Co., C. C. Ill. 1879, 1 F. 68) nor the lessor (citing Ramsdell v. Insurance Co. of North America, 1928, 197 Wis. 136, 221 N. W. 654) would be entitled to recover from the insurer. A few cases have reached a contrary conclusion (citing Pink v. Smith, 1937, 281 Mich. 107, 274 N. W. 727; Savarese v. Ohio Farmers' Ins. Co. of LeRoy, Ohio, 1932, 260 N. Y. 45, 182 N. E. 665, 91 A. L. R. 1341).'

"Enough has been said, we think, to show that the question submitted to the District Court in the instant case was and is a doubtful question of Iowa law. The Iowa Supreme Court, were this case before it, might adopt the rule which prevails in New York or it might conclude that the rule contended for by the Insurance Company is the better one. The Insurance Company has not demonstrated, and we think it would not be possible to demonstrate, that the conclusion reached by the District Court was not a permissible one or that it was based upon a misapplication or misconception of the applicable law of Iowa."

Directly analogous to the case on appeal is the opinion in *Tauriello v. Aetna Insurance Co.* (N. J., 1951), 82 A. 2d 226. This was an action by the heirs of one Crescenzi on a policy insuring against loss by fire to certain property. The policy was endorsed to the heirs who brought the action, after the insured's death. Prior to the insured's death the State of New Jersey had contracted with him to purchase the property at a fixed

price and the purchase was consummated after the fire without abatement in price because of fire damage. The New Jersey court of review held the insured had sustained no loss under the policy and said:

> "The general rule is that a contract for insurance against fire is ordinarily one of indemnity under which the insured is entitled to receive indemnity or to be reimbursed for any loss that he may have sustained and cannot recover if he has sustained no loss. See 45 C. J. S., Insurance, Sec. 915, page 1009. In Draper v. Delaware . . . 91 Atl. 206, it was pointed out that a fire insurance policy is a contract not to insure the property against fire but to insure the owner against loss by fire, and that the insurance company can be called upon when, and only when, the insured has sustained a loss which under the terms of the policy calls for indemnification. The same rule finds support in Patterson v. Durand . . . 24 N. E. 2d 740 (1940).
>
> "In New Jersey the rationale of the cases cited below are in support of the above rule. In United Bond & Mortgage Co. v. Concordia Fire Insurance Co., 113 N. J. L. 28, 172 Atl. 373 . . . the court said: 'It was, of course, incumbent upon the plaintiff to show damages for which it was entitled to recover under the terms of its policy of insurance. This it failed to do. One who sues upon a contract must prove damages. The facts stipulated, as before indicated, negate damages to the plaintiff by reason of the fire, but on the contrary are eloquent of the fact that its loss occurred by reason of the foreclosure.' (Also citing Power Bldg. & Loan v. Ajax Fire Ins. Co. (N. J. L.), 164 A. 410.)"

In *Draper v. Delaware, etc.* (Del.), 91 Atl. 206 (cited in *Tauriello v. Aetna Insurance Co., supra*), the court said:

> "A contract of insurance is essentially a personal contract. (Citing Traders Ins. v. Newman.) It is not a contract to insure property against fire, but is one to insure the owner of property against loss by fire. Destruction by fire of the property described in the contract of insurance is not the contingency upon which the insurer promises to indemnify the insured. It is only when by fire the insured has sustained a loss that the insurer may be called upon to perform its contract of insurance."

Thus in *Ramsdell v. Insurance Co.,* 197 Wis. 136, 221 N. W. 654, cited throughout the opinion of the United States Court of Appeals in *Citizens Insurance Co. v. Foxbilt, Inc., supra,* and again in the New Jersey opinion *Tauriello v. Aetna Insurance Co., supra,* the owners of a building were held not to have sustained a loss under a fire insurance policy because the lessee, having recovered from his own insurance company, had repaired the building after the fire.

Also see the following cases cited by the court in support of its opinion in *Tauriello v. Aetna Insurance Co.:*

Marshall Spinning Co. v. Travelers Fire Ins. Co., 325 Pa. 135, 188 Atl. 839;

Schultz, etc. v. Home Insurance Co., 205 Ill. App. 297;

Larner v. Commercial Union Assur. Co., 127 Misc. 1, 215 N. Y. Supp. 151.

The case of *Beman v. Springfield F & M Ins. Co.,* 303 Ill. App. 554, 25 N. E. 2d 603, is of interest. The ruling applied by the District Court herein was applied in this

Illinois case where an option to purchase the property given prior to the fire was exercised after the fire without diminution in price. The reviewing court reversed the trial court's ruling which had been in favor of the insured.

Also see:

Palatine Insurance Co. v. O'Brien, 107 Md. 341, 68 Atl. 484;

Cooleys Briefs on Insurance, 2d Ed., Vol. 1, p. 6.

In the case at bar the insured did not challenge the right of the County to exercise the power of eminent domain over her property [Tr. pp. 35-36]. For some time before and when the fire occurred she was bound to lose ownership of the property at the value determined or agreed upon in that action. She saw fit to agree that the value was $26,400.00 before the fire and she accepted that in full payment. It would seem of little importance when the agreement was dated, the important thing being that she agreed upon the value as of a time unaffected by the fire and received payment unaffected by the fire.

D. There Was No Genuine Dispute in Material Fact Before the District Court.

Appellee understands the rule in reference to summary judgments to be that a defendant may move for summary judgment when he believes he is entitled to a judgment either on the pleadings or on the basis of extrinsic facts established by affidavit, deposition or stipulation. See Rule No. 56(b), Fed. Rules of Civ. Proc., 28 U. S. C. A.; *Gifford v. Travelers Protective Association,* 153 F. 2d 209.

Appellee felt it was entitled to summary judgment under the pleadings and evidence once certified portions

of the record from the condemnation action were received in evidence as Exhibit "A." It is submitted that to attempt to show that a genuine dispute existed as to material facts, it was incumbent upon appellant at this point to present affidavits or offer evidence showing the existence of such a dispute. See *Lorentz v. RKO Radio Pictures* (9th Cir.), 155 F. 2d 84, cert. den., 67 S. Ct. 81, 329 U. S. 727, 91 L. Ed. 629. However, the appellant chose not to file affidavits or offer evidence in opposition to appellee's motion; instead, appellant filed her own motion for summary judgment [Tr. pp. 24-29] which is discussed in the next section of this brief. It will be noted that in connection with her motion for summary judgment appellant's effort was directed to an attempt to go behind the record of the condemnation case.

E. Appellant's Motion for Summary Judgment Was Properly Denied.

Before appellant's motion could be considered favorably, appellee's motion for summary judgment would have to be denied. Therefore, for the sake of this discussion, appellee will disregard the defense which was the basis for the granting of its motion.

Appellant's motion was in disregard of the fact that the policy in suit is an open policy, not a valued policy, and that appellant, therefore, has the burden of proving the extent of loss and damage to the subject matter of the policy. This hiatus in appellant's position begins with the absence of an allegation in her complaint as to the value of or the amount of damage caused the building which was the subject of the policy. This omission continues through appellant's objections to appellee's proposed Findings of

Fact and through her own motion for summary judgment. Appellant's sole reference to values or damage in any form is to the effect that in her answer to the complaint in eminent domain she alleged the value of the entire property on Bunker Hill Street, including improvements, to be not less than $75,000.00 [see affidavit in support of appellant's said motion, Tr. pp. 30-31]. Nowhere is there a statement or allegation of the alleged value of the insured building or of the cost of repair or replacement. The building may have been of little or no value; at least appellant has been silent thereon.

It is evident from these facts that in addition to appellee's affirmative defense, there was a genuine issue concerning a material fact, to wit, the amount of loss or damage caused the building by fire. Appellant offered nothing in connection with her motion to suggest that there was no genuine dispute as to this fact. Although there was nothing to refute, in an excess of caution appellee's counsel filed an affidavit in opposition to appellant's motion showing that there was a genuine issue concerning this fact. Through inadvertence this affidavit was not included in the record on appeal (although the entire record was designated), and appellee is now filing a supplemental designation requesting the Clerk of the District Court to forward the said affidavit for filing as part of the record on appeal. The affidavit is brief and appellee respectfully requests that this Honorable Court accept same as part of the record on appeal. Under the circumstances, appellee takes the liberty of having the affidavit printed as an appendix to this brief.

It is submitted as self-evident that appellant's motion for summary judgment was properly denied.

Conclusion.

It is respectfully submitted that the orders and judgment of the District Court were proper and should be affirmed.

Respectfully submitted,

ANGUS C. MCBAIN,

MCBAIN & MORGAN,

By ANGUS C. MCBAIN,

Attorneys for Appellee.

APPENDIX.

[Title of District Court and Cause]

AFFIDAVIT OF ANGUS C. McBAIN IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

State of California, County of Los Angeles—ss.

Angus C. McBain, being first duly sworn, deposes and says: That he is one of counsel of record for the defendant, Pearl Assurance Company, Limited, and is fully familiar with the issues herein and the evidence which would be offered by said defendant upon a trial of this case; that in behalf of said defendant affiant proposes to offer substantial testimony from well qualified expert witnesses to the effect that the improvements which were damaged and destroyed by fire on plaintiff's property on February 4, 1957, were of no value whatsoever at the time of said destruction in that said improvements were obsolete, dilapidated, run down, were in the nature of "slums," virtually constituted a nuisance and were in fact in process of being condemned by the County of Los Angeles, together with the entire property.

That said defendant challenges and in its answer on file herein has joined issue with plaintiff's allegation as to the value of said improvements and in the event defendant's motion for summary judgment were denied herein, there is a genuine and meritorious issue of fact still to be tried and decided.

/s/ ANGUS C. McBAIN.

Subscribed and sworn to before me this 13th day of February, 1958.

/s/ ELIZABETH PINNEY,
Notary Public in and for said County and State.

No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellee.

APPELLANT'S REPLY BRIEF.

WILLIAM H. BRAWNER, and
ERNEST W. PITNEY,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellant.

FILED
AUG 13 1958
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Insuring companies cannot escape liability by any occurrence, or transactions of insured with third parties subsequent to loss.... 1

II.

Interpretation of contract..... 3

III.

Appellee's Exhibit "A" is incompetent and its admission in evidence prejudicial error..... 5

Conclusion 6

TABLE OF AUTHORITIES CITED

CASES — PAGE

Dubin Paper Co. v. Ins. Co. of North America, 8 A. L. R. 2d 1393, 361 Pa. 68, 63 A. 2d 96 2

Fireman's Fund Insurance Company v. Globe Navigation Company, 236 Fed. 618 3

Flood Control District v. Andrews, 52 Cal. App. 788 5

Fritz v. Metropolitan Life Ins. Co., 50 Cal. App. 2d 570, 123 P. 2d 622 3

Glickman v. N. Y. Life Insurance Co., 16 Cal. 2d 626, 107 P. 2d 252 4

Heidisch v. Globe & Rep. Ins. Co. of America, 368 Pa. 602 2

New York Life Insurance Company v. Eunice B. Hiatt, 140 F. 2d 752, 168 A. L. R. 551 4

STATUTES

Code of Civil Procedure, Sec. 1249 5

Code of Civil Procedure, Sec. 1253 5

Insurance Code, Sec. 301 2

TEXTBOOKS

29 American Law Reports 2d, p. 884 2

14 California Jurisprudence, Sec. 24, p. 444 3

14 California Jurisprudence, Sec. 24, p. 445 4

45 Corpus Juris Secundum, Sec. 915, p. 1010 1

No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

Insuring Companies Cannot Escape Liability by Any Occurrence, or Transactions of Insured With Third Parties Subsequent to Loss.

Appellee, in its brief on page 14, quotes with favor a portion of the text from 45 C. J. S., Insurance Section 915, page 1010. Appellee conveniently omits the following pertinent portions of said text:

> "THE INSURER'S OBLIGATION OF LIABILITY UNDER A POLICY OF FIRE INSURANCE IS MEASURED AND DEFINED BY THE TERMS OF THE POLICY; THE INSURED IS ENTITLED TO RECOVER TO THE EXTENT OF HIS LOSS OCCASIONED BY THE FIRE, NOT EXCEEDING THE MAXIMUM AMOUNT STATED IN THE POLICY. The obligation or liability of an insurer under a policy of fire insurance is measured and defined by the terms of the policy, and cannot be enlarged or varied

> by judicial construction. . . . Also insurer's liability cannot exceed the maximum amount named in the policy. Speculative collateral questions should not be allowed to enter into the ascertainment of actual value; so insurer's liability is not affected by the fact that the insured had offered to sell the property for less than its actual value. The fact that the amount of loss cannot be determined without difficulty, or is to some extent a matter of estimate, does not affect insurer's liability or insured's right to compensation."

An examination of the terms of the policy in light of the above citation discloses the liability of the insured as therein set forth as follows, to wit [T-13]:

> "does insure . . . to the extent of the actual cash value of the property at the *time of loss* . . . against all loss by fire."

The "loss" mentioned in the insuring contract is defined in *Dubin Paper Co. v. Ins. Co. of North America,* 8 A. L. R. 2d 1393, 361 Pa. 68 at 91, 63 A. 2d at 96:

> "The loss the company contracts to remedy is the fire-created depletion of the insured's assets, and that is made up not by the erection of a duplicate of the building destroyed but by paying the insured its value in money. This liability the insuring companies cannot escape by anything any third party may later do for the insured's benefit." (See App. Op. Br. p. 18.)
>
> Cal. Ins. Code, Sec. 301;
>
> *Heidisch v. Globe & Rep. Ins. Co. of Am.,* 368 Pa. 602;
>
> 29 A. L. R. 2d p. 884.

II.

Interpretation of Contract.

The above quoted insuring provision from the fire policy here in question would certainly convey to the ordinary man, having such a policy, that it meant just what it said. He would have the right to understand that he was protected against fire loss at the time the fire occurred. He certainly would not be given to understand that the insuring provision was meant to operate so greatly to his disadvantage as to tend to defeat the protection for which he negotiated and paid for, by the happening of uncertain, unpredictable events occurring long after the fire, which might or might not occur, such as a sale of the property, or of its disposal through eminent domain proceedings or on the happening of any other similar event or transaction with a third party for the insured's benefit.

The insurer is bound to use such language as to make the conditions, exceptions, and provisions of the policy clear to the ordinary mind, and in case it fails to do so, any uncertainty, ambiguity or reasonable doubt should be resolved against it.

14 Cal. Jur. (Ins., Sec. 24), p. 444;

Fireman's Fund Insurance Company v. Globe Navigation Company (9 C. C. A.), 236 Fed. 618, 633;

Fritz v. Metropolitan Life Ins. Co., 50 Cal. App. 2d 570, 123 P. 2d 622, 626.

When the language employed in an insurance policy is ambiguous, or when a doubt arises in respect to the application, exceptions to, or limitations of, liability there-

under, they should be interpreted most favorably to the insured, or to the beneficiary to whom the loss is payable.

14 Cal. Jur. (Ins., Sec. 24), p. 445;

Glickman v. N. Y. Life Insurance Co., 16 Cal. 2d 626, 107 P. 2d 252, 256;

New York Life Insurance Company v. Eunice B. Hiatt, 140 F. 2d 752, 168 A. L. R. 551.

Appellee, on page 18 of its Brief, in an apparent attempt to bolster its untenable position, makes the following misstatement of facts, to wit:

> "For some time before and when the fire occurred she was bound to lose ownership of the property at the value determined or agreed upon in that action. *She saw fit to agree that the value was $26,400.00 before the fire and she accepted that in full payment.* It would seem of little importance when the agreement was dated, the important thing being that she agreed upon the value as of a time unaffected by the fire and received payment unaffected by the fire."

There is no evidence that Appellant at any time agreed that the value of the property *before* the fire was the sum of $26,400.00 or any sum, other than the sum of $75,000.00 as alleged in her Answer in the suit in Eminent Domain No. 658477. There is no evidence that Appellant at any time, before the fire, offered to accept a sum less than $75,000.00 for her property and any gratuitous statements by Appellee to the contrary are cunningly contrived by Appellee in an attempt to escape its obligation and are without foundation in fact and are untrue.

III.

Appellee's Exhibit "A" Is Incompetent and Its Admission in Evidence Prejudicial Error.

The papers and documents comprising Appellee's Exhibit "A" pages 3-4 of Appellee's Brief, are without exception concerning transactions occurring *subsequent* to the fire loss and between Appellant and a third party not a party to this proceeding. All of said documents and pleadings [Appellee's Ex. "A"] pertained only to property remaining in Appellant's hands subsequent to the fire. They could not possibly refer to non-existent property which had been destroyed by fire. They refer only to the real property and the improvements remaining thereon after the fire. They could not possibly refer to non-existent property but only to the property *actually* taken in said action by the County of Los Angeles, Condemnor Plaintiff.

Code Civ. Proc., Secs. 1249 and 1253;

Flood Control Dist. v. Andrews, 52 Cal. App. 788.

It is self evident that Appellee's Exhibit "A" concerns a third party not a party to this action and transactions occurring subsequent to the fire loss and is incompetent, irrelevant and immaterial and that its admission in evidence in this proceeding for Summary Judgment is highly prejudicial and erroneous. It affirmatively appears that said incompetent evidence mislead the trial court and induced the court to make an essential finding which is otherwise without support and would not have been made.

Appellee has at all times admitted liability, under its fire loss contract of insurance, for the payment of the loss of rentals caused Appellant by the fire and it follows that Appellant is entitled to judgment for this amount. Appellee's statement in its Brief on page 2 that it "tendered payment of the loss of rentals and the rental claim has been paid by Appellee and accepted by Appellant since the filing of this appeal" has no foundation in fact and is untrue.

Conclusion.

It is respectfully submitted that orders and judgment of the District Court should be reversed.

William H. Brawner, and
Ernest W. Pitney,
By William H. Brawner,
Attorneys for Appellant.

No. 15,994

United States Court of Appeals

For the Ninth Circuit

CHARLES CROWTHER and
IVY L. CROWTHER,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPELLANTS' OPENING BRIEF.

LEON SCHILLER,
105 Montgomery Street,
San Francisco 4, California,
MORRIS M. GRUPP,
Mills Tower, San Francisco 4, California,
Attorneys for Appellants.

FILED
MAY 10 1959
PAUL P. O'BRIEN, CLERK

Subject Index

		Page
I.	Jurisdiction	1
II.	Statutes involved	2
III.	Statement of case	4
IV.	Specification of errors	6
V.	Argument	7
	A. Summary of argument	7
	B. The facts	9
	C. The law	14
	I. The Tax Court erred in disallowing as an income tax deduction a portion of appellant's costs and expenses in operating his automobiles and jeep	14
	II. The Tax Court should have held that the 1951 notice of deficiency was excessive and arbitrary and therefore unlawful	30
VI.	Conclusion	36

Table of Authorities Cited

Cases

	Pages
Barnhill v. Commissioner, 148 F. 2d 913	21
Chandler v. Commissioner, 226 F. 2d 467	26
Commissioner v. Flowers (1946), 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203	7, 14, 15, 17, 19, 22
Cooper v. Commissioner, 12 T.C.M. 471	19
Emmért v. United States, and Jasper v. United States (1955) (consolidated cases), 146 F. Supp. 322	16, 20, 26
Gustafson, 3 T.C. 998	22
Helvering v. Taylor, 293 U.S. 507, 55 S. Ct. 287	33
J. G. Frazier, Jr. v. Commissioner, 12 T.C.M. 1129	19
Leach v. Commissioner, 12 T.C. 20	19
Moss v. United States (1956), 145 F. Supp. 10	20
Preddy v. Commissioner, 43 B.T.A. 18	22
Robert B. Denning, 14 T.C.M. 838	19
Schurer v. Commissioner, 3 T.C. 544	19, 22
Solicitor's Memorandum 1048, 1 C.B. 101 (1919)	21
Stegall v. Thurman, 175 F. 813	31
Stegner v. Commissioner, 14 T.C.M. 1081	19
Tracy v. Commissioner, 39 B.T.A. 578	22
Wallace v. Commissioner (9th C.A.), 144 F. 2d 407	22
Waters v. Commissioner, 12 T.C. 414	26

Rules

Rules on Appeal, Rule 29	1

Statutes

	Pages
Internal Revenue Code of 1939:	
Section 23	2
Section 23(a)(1)(A)	3, 15, 22
Section 23(1)	3
Section 24	3
Section 24(a)(1)	3
Internal Revenue Code of 1954:	
Section 162	3
Section 162(a)	3
Section 162(a)(2)	3
Section 167(a)	3
Section 6213(a)	1, 2
Sections 7482(a) and (b)	1
Section 7484	1

Texts

Commerce Clearing House 1959 Standard Federal Tax Reporter, Paragraph 1352	29
1956 Prentice-Hall Federal Taxes:	
Paragraph 21005	31
Paragraph 76425	26, 27, 28
Paragraph 76519	23
Revenue Ruling 190, 1953—2 C.B. 303	25
Revenue Ruling 54-497, 1954—2 C.B. 75	28
I. T. 1264, I—1 C.B. 122 (1922)	22
I. T. 3314, 1939—2 C.B. 152	22
G.C.M. 23672, 1943, C.B. 66	22

No. 15,994

United States Court of Appeals

For the Ninth Circuit

CHARLES CROWTHER and
IVY L. CROWTHER,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPELLANTS' OPENING BRIEF.

I. JURISDICTION.

This appeal is from a decision in favor of the Commissioner of Internal Revenue rendered in The Tax Court of the United States, in consolidated proceedings brought by appellants for redetermination of two income tax deficiencies, pursuant to the provisions of I.R.C. Sec. 6213(a).

The decision of The Tax Court of the United States was rendered on December 2, 1957 (R. 176-177). On February 24, 1958, a petition for review was filed with the Clerk of The Tax Court of the United States (R. 178) pursuant to the provisions of I.R.C. Secs. 7482(a) and (b) and Rule 29 of this Honorable Court and within the time provided by I.R.C. Sec. 7484.

Appellants, Charles Crowther and Ivy L. Crowther, filed joint income tax returns for the years in issue, 1951 and 1954. A notice of deficiency was issued by the Commissioner of Internal Revenue for each of said years (R. 8; R. 23). The appellants' petitions for redetermination of each of said deficiencies alleged facts showing jurisdiction in The Tax Court of the United States pursuant to I.R.C. Sec. 6213(a) (R. 1; R. 13).

II. STATUTES INVOLVED.

The 1939 Internal Revenue Code applied to the 1951 proceeding, and the 1954 Internal Revenue Code applied to the 1954 proceeding. The pertinent portions of the 1939 Internal Revenue Code are as follows:

Section 23.

"Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

1. Trade or Business Expenses.

A. In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * * * * * *

(l) Depreciation.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income."

Sec. 24. Items Not Deductible.

"(a) General Rule. In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, * * *"

The first sentence of Section 162(a) and Section 162(a)(2) of the 1954 Internal Revenue Code recite precisely the same language as that quoted above from Section 23(a)(1)(A), and there has therefore been no change in the statute.

Section 167(a) of the 1954 Internal Revenue Code, enacted in place of the portion of Section 23(1) of the 1939 Internal Revenue Code quoted above, provides as follows:

"(a) General Rule.—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)

(1) of property used in the trade or business, or

(2) of property held for the production of income."

Section 162 of the 1954 Internal Revenue Code, enacted in place of Section 24(a)(1) of the 1939 Internal Revenue Code quoted above, provides in part as follows:

"* * * no deduction shall be allowed for personal, living, or family expenses."

III. STATEMENT OF CASE.

This proceeding involves the proper determination of appellants' liability for federal income taxes for the years 1951 and 1954.

During said years appellant Charles Crowther (hereinafter whenever a single appellant is referred to, reference is made to Charles Crowther) was employed in cutting down timber and sawing it into logs at designated temporary lay-outs or job-sites in the woods. For both years appellant claimed deductions on his income tax returns for automobile expenses (depreciation, repairs, gas and oil, and insurance) when he owned an automobile or other vehicle solely because he could not maintain his employment without said automobile or other vehicle and when said conveyances were used in appellant's trade or business to transport his tools and equipment to work, house his tools and equipment while he worked in the woods, and to transport him from his "tax home" to temporary job-sites daily.

The Commissioner of Internal Revenue disallowed 80% of the deductions taken for depreciation expense, gas and oil, and insurance for the year 1951, and the entire $125.00 cost of a Plymouth automobile purchased in that year (R. 8-11). The Commissioner of Internal Revenue disallowed all the automobile depreciation claimed in 1954 and disallowed $125.00 of

a total of $313.06 taken for depreciation and repairs to a jeep (R. 23-26). Said conveyances were owned and used for the purposes above set out.

The Tax Court held that the conveyances were used by appellant for the dual purpose of commuting between his home and work and for transporting tools and equipment used by him in his trade or business and increased the amount of the deductions for automobile expenses over that allowed by the Commissioner, but held that said expenses were deductible as ordinary and necessary business expenses only to the extent that said expenses represented the cost of transporting the tools and equipment (R. 172, 174).

Appellants urge that The Tax Court did not allow deductions for a sufficient amount of automobile expenses because said Court failed to allow any deductions for the use of the conveyances in housing tools and equipment in the woods while appellant was there on the job or for transporting appellant from his residence, which in this case constituted his "tax home," to temporary job-sites and return daily, or by reason of the fact that appellant owned the conveyances solely because he could not maintain his employment without them.

Appellants further urge that the deficiency determination for 1951 was arbitrary and unlawful because it was made for the purpose of nullifying the statute of limitations and was so made without any previous audit of appellants' records or any investigation whatever and without furnishing appellants with a 30-day letter as provided by law. The Tax Court held that

it was without jurisdiction to consider the propriety of the administrative policies and procedures employed prior to issuing the notice of deficiency for 1951 (R. 175). Appellants urge that The Tax Court had the jurisdiction to review the procedures employed prior to issuing the notice of deficiency and that if The Tax Court properly exercised its jurisdiction, it would have held the 1951 notice of deficiency invalid.

Therefore, the questions before this Honorable Court are:

1. Did The Tax Court err in disallowing a portion of appellant's automobile expenses on the grounds that said disallowed portion represented a commuter expense?

2. Did The Tax Court err in determining that it had no jurisdiction to review the propriety of the administrative policies and procedures employed by respondent before respondent issued his notice of deficiency for the year 1951?

3. Assuming that The Tax Court had jurisdiction to so review, should it, under the facts of this case, have held that the 1951 notice of deficiency was arbitrary and unlawful?

IV. SPECIFICATION OF ERRORS.

1. The Tax Court erred in disallowing as an income tax deduction a portion of appellant's costs and expenses in operating his automobiles and jeep on the

ground that said disallowed costs and expenses represented a personal commuting expense.

2. The Tax Court's findings of fact for 1951 and 1954 are in error in that the Court did not allow appellants the proper deduction for automobile and jeep costs and expenses incurred for said years (R. 169-171).

3. The Tax Court erred in determining that it had no jurisdiction to review the propriety of the administrative policies and procedures employed by respondent before respondent issued his notice of deficiency for the year 1951.

4. The Tax Court erred in not holding that the 1951 notice of deficiency was arbitrary and unlawful.

V. ARGUMENT.

A. SUMMARY OF ARGUMENT.

The applicable Internal Revenue Code provision provides that traveling expenses, including the entire amount expended for meals and lodging while away from home in pursuit of a trade or business, are deductible for income tax purposes. In *Commissioner v. Flowers* (1946), 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, the United States Supreme Court established the three conditions that must be satisfied to secure a traveling expense deduction under this code section. In said case, the Supreme Court held that a commute expense is not deductible even if said commute be 300 miles, where said long-range commute is estab-

lished for the personal convenience of the taxpayer. The Court stressed that business trips are to be identified in relation to business demands and the traveler's business headquarters.

We will establish by the facts and applicable law that appellant's traveling expenses satisfied said three conditions required by the United States Supreme Court, and further, that the business headquarters of appellant were in Fort Bragg and that therefore Fort Bragg constituted appellant's "tax home." We will further establish that all the applicable decisions of the courts and the rulings of the Commissioner of Internal Revenue provide that where a taxpayer travels approximately 40 miles a day to various temporary job-sites, said taxpayer is away from home and he is permitted to deduct the cost of traveling from his "tax home" to said temporary job-sites and the cost of returning from said temporary job-site to his home, regardless of whether he makes said round-trips daily or at other intervals. Further, if taxpayer incurred food and lodging expenses at said temporary job-sites, he would be entitled to deduct not only the cost of transportation, but the cost of said food and lodging. We will further show that under the decisions and applicable rules, when a taxpayer travels approximately 40 miles away from his "tax home" on a trip that requires two hours' travel (or four hours' round-trip), the length and duration of such a trip establishes that he is "away from home."

The Tax Court of the United States has the jurisdiction to review the propriety of administrative poli-

cies and procedures employed by the Commissioner of Internal Revenue prior to the Commissioner's issuing his notice of deficiency. The facts will show that an arbitrary deficiency determination was made by the Commissioner of Internal Revenue purely for the purpose of nullifying the statute of limitations, and a determination made for this purpose should not have been sustained by The Tax Court.

B. THE FACTS.

Appellants and their three children resided in Fort Bragg, California, from 1950 to the present (R. 41-45; 70).

During 1951 and 1954, appellant was employed as a "faller" and "bucker," in which employment he cut or sawed down trees and sawed them into marketable logs for a compensation based on a stated amount per thousand board feet of logs (R. 163). Upon appellant's commencing an employment, a portion of timberland or so-called "lay-out" was designated as the site in which he would work (R. 163). When the "lay-out" was cut over, another "lay-out" was designated, and so on until the employer's logging operations were completed (R. 163).

During 1951, appellant worked at three lay-outs (R. 164). The distance traveled by appellant in going from his home in Fort Bragg, California, to the "lay-outs" varied between 42 and 44 miles (R. 164-165). For appellant to reach the "lay-outs" at which he worked, it was necessary for him to drive in a north-

erly direction to Rockport and, after leaving the Fort Bragg to Rockport highway, to travel over one of two routes (R. 43; R. 165). About one-half of one route was a public road and the remainder was an unimproved private logging road. This route required the fording of a creek, which was at an unpassable depth during the winter months (R. 165). The other route, which was used during the winter months, was entirely over an unimproved private logging road. The logging roads were rough, winding and steep (R. 165). Appellant's employer during 1951 did not furnish transportation between the "lay-outs" and the "fallers'" homes (R. 165). There was no public transportation available between appellant's home and the lay-out at which he worked, or between the lay-out and any place where appellant could have lived, nor were there any living accommodations available for appellant or his family at or near the "lay-outs" where he worked (R. 165-167).

During 1954, appellant worked as a "faller" and "bucker" for two different companies. He worked for H. A. Christie Company, Inc. during the first part of 1954 and until July or August of that year, when it completed its logging operations under the contract under which it had been operating (R. 165-166). He worked for said company at two separate "lay-outs" about four miles apart. To reach the "lay-outs" appellant traveled about 30 miles south from Fort Bragg. About one-half the distance was over a public road and the remainder over a private logging road (R. 166).

Within two or three days after the termination of his employment, appellant began working for Hildebrands, Inc., Ukiah, California, and worked for that company through one week in January, 1955, when he was laid off. During the first six weeks of his employment, he worked at a "lay-out" he reached from his home by traveling over 35 miles of a paved road and nine miles of private logging road. Thereafter and until January, 1956, he worked in another "lay-out" which he reached from his home by traveling over 35 miles of paved road and six miles of logging road (R. 166).

Neither of appellant's employers during 1954 furnished transportation between the "lay-outs" and the "fallers' " and "buckers' " homes (R. 166). There was no public transportation between the appellant's home and the lay-out at which he worked or between the lay-out and any place where appellant could have lived, nor were there any living accommodations available for appellant or his family at or near the "lay-outs" where he worked (R. 166-167).

Appellant required two hours per day to drive to the job-site and two hours to return (R. 48).

There was no union or central agency through which appellant secured work, and he secured his jobs by calling on logging operators (R. 66). Fort Bragg was centrally located in the timber area (R. 137-138) and appellant drove approximately 50 miles south, east and north in securing employment (R. 66).

During the years here involved, the appellant's average gross income per day was approximately $40.00

(R. 163). Appellant's employers did not require him to work any specific number of days per week, nor was appellant required to report for work at any particular hour on the days he worked (R. 163). Appellant provided equipment which he used in his employment during 1951 and 1954. This equipment included a chain saw, two bars and chains for the saw, springboards, gun sticks, axes, sledge hammers, from four to fourteen wedges, tools for servicing and repairing equipment, spare parts for on-the-job repairs, and safety equipment (R. 51; 164). In addition, appellant provided lubricating oil for his equipment and a can of gasoline to power his saw (R. 164).

At the end of a day's work, appellant took home his can of gasoline, tools that were broken and needed repairs or tools that needed sharpening, and his spare tools and equipment, and it was rare when equipment was not brought home for repairs (R. 54, 164).

In 1950, appellant purchased a 1947 Cadillac automobile for $2,805.00, which he used during 1951 and 1954. About July, 1951, he purchased for $125.00 a 1937 Plymouth and junked it after using it a year. In November, 1953, he purchased for $400.00 a jeep which he continued to own throughout 1954 (R. 167).

From January, 1951, to July, 1951, appellant used the Cadillac to drive to and from the job-sites. The appellant then used the 1937 Plymouth for said purposes as it was better suited for driving over logging roads. The Cadillac was used when the Plymouth was not in running condition (R. 167).

90% to 95% of the wear and tear on the Cadillac in 1951 was incurred in driving to and from the job-sites, and only 5% to 10% from pleasure use (R. 90-91). The 1937 Plymouth was used exclusively for driving to and from the job-sites (R. 89). The Tax Court allowed only 30% of the wear and tear on the Cadillac as a tax deduction and only 50% of the wear and tear on the Plymouth. (The Plymouth cost $125.00 and was used from July, 1951, to July, 1952. Apparently The Tax Court computed depreciation for six months at $62.50 and allowed $30.00 or approximately one-half, as a tax deduction.) The Tax Court allowed only $140.00 of the $245.55 spent for gas and oil in driving to and from the job-sites and a portion of the car insurance (R. 169).

During 1954 appellant generally used his jeep to drive to and from the job-sites (R. 167). On occasions when the jeep was not in running condition he used the Cadillac for said purpose (R. 168). Appellant had to have a second car available to him as otherwise he would lose a day's work when the first car broke down (R. 93). Such breakdowns were common and occurred at least once a week to the jeep during the latter part of 1954 (R. 93-94). Although the jeep was used exclusively for driving to and from the job-sites, the Tax Court sustained the Commissioner's determination that $125.00 of the $313.06 depreciation and repair expense was non-deductible (R. 170). The Court allowed only 10% of the depreciation on the Cadillac although the non-business use was negligible (R. 94).

It was stipulated that appellants were not furnished with the 30-day letter or auditor's report of proposed adjustments for 1951 (R. 31). There is no evidence to show that the respondent's agents ever interviewed the appellants or the appellants' representatives, or any persons having knowledge of the facts, prior to respondent's making the 1951 deficiency determination. There is no evidence to show that appellants were ever asked to sign waivers extending the statute of limitations. No evidence was offered by respondent as to where an alleged error was found or suspected or that respondent did not have time to proceed with "Procedure for Informal Conference under Reorganization Plan No. 1 of 1952," which procedure was in effect at the time the deficiency was determined. The 1951 determination was made seven days before the statute of limitations would have expired on appellants' 1951 income tax return. The only reasonable inference is that respondent made the arbitrary deficiency determination in 1951 to avoid the statute of limitations.

C. THE LAW.

I. THE TAX COURT ERRED IN DISALLOWING AS AN INCOME TAX DEDUCTION A PORTION OF APPELLANT'S COSTS AND EXPENSES IN OPERATING HIS AUTOMOBILES AND JEEP.

The Tax Court disallowed a portion of appellant's costs and expenses of operating his automobiles and jeep upon the ground that said disallowed portion represented a personal commuting expense under the authority of *Commissioner v. Flowers, supra* (R. 172-

3). In arriving at this conclusion the Tax Court misconstrued the law established by said Supreme Court decision and drew conclusions from it which are contrary to various court decisions and various administrative rulings.

In *Commissioner v. Flowers, supra,* the United States Supreme Court held that three conditions must be satisfied to secure a traveling expense deduction under Section 23(a)(1)(A) 1939 I.R.C., to wit:

> "1. The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> 2. The expense must be incurred while away from home.
>
> 3. The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

In said decision, the Supreme Court sustained the validity of the Commissioner's regulation that commuters' fares are not deductible for income tax purposes, and held that where the taxpayer's permanent business headquarters were in one city and the taxpayer chose for his own personal convenience to live 300 miles from his business headquarters, the taxpayer could not deduct food and lodging expenses in-

curred at the business headquarters nor the cost of traveling between his residence and his business headquarters. This decision did not establish, nor did it claim to establish, that the cost of a taxpayer in traveling from his residence to his work is never deductible, but rather laid down three conditions which must be met before such costs are deductible for income tax purposes. Only by analyzing the decisions and the rulings since the Flowers case, which decisions and rulings involve facts analogous to the facts in the instant case, can we arrive at the correct basis for the decision in this case.

Thus, in *Emmert v. United States,* and *Jasper v. United States* (1955) (consolidated cases), 146 F. Supp. 322, Emmert and his wife lived in Shelbyville, Indiana, which was located 30 miles from Indianapolis, the capital of Indiana. Jasper and his wife lived in Fort Wayne, Indiana, 119 miles from Indianapolis. Both Shelbyville and Fort Wayne were connected to Indianapolis by a main paved highway. Emmert and Jasper were judges of the Supreme Court of Indiana and had taken office in 1946 and 1947 respectively for six-year terms. Under the law of the State of Indiana, one judge was elected from each judicial district and was required by law to reside in the district in which he was elected. Emmert and Jasper complied with the law. The courtroom of the Supreme Court of Indiana was located in Indianapolis, and each judge was provided with an office in the same building in which the courtroom was located. All sessions of court were held in In-

dianapolis, and clerks, typists, court records and adequate research facilities were available only in Indianapolis. Emmert and Jasper prepared their opinions in their chambers in Indianapolis. Judges were authorized to make orders and rulings at their residences when such orders or rulings could by law be made by a single judge, but there was no evidence that Emmert and Jasper performed any services whatever at their residences.

For 1948 and 1949 Emmert deducted for each year automobile expenses for approximately 221 daily round-trips to Indianapolis by automobile. Jasper claimed one-half of his car expenses and $1,369.50 for meals and lodging in Indianapolis during 1949.

The District Court applied the three conditions set down in *Commissioner v. Flowers, supra,* and held that Emmert and Jasper were entitled to the deductions claimed. The Court held that neither of them were commuters under the law because no personal desire, choice or convenience was involved in the expenses. The Court held that Emmert, who chose to travel home almost daily, was not to be penalized because he minimized his business expense by avoiding the expense of lodging.

Faced with this decision, the Tax Court in the instant case said that the Emmert case didn't apply because the judges "were required by the constitution of their state to reside in the district from which they were elected, but who were called upon to render the principal part of their services at the State Capital, which was outside of their districts" (R. 173-174).

The Tax Court in effect said that if the constitution or other law of a state required a taxpayer to incur abnormal traveling expenses between his residence and his place of business, said expenses were deductible. The Tax Court recognized that the Emmert case stated a sound legal principle, yet it approved the case on a narrow interpretation and thus missed the whole point of the case. The District Court in the Emmert case sustained the deduction because it was business necessity, and not personal convenience or desire, that required that Emmert and Jasper incur traveling expenses. The District Court recognized the existence of conditions which caused the traveling expenses, and which conditions could not be overcome by the taxpayer. The fact that said condition was created by state law was not the deciding factor but rather it was the existence of the condition itself, to wit, the fact that it was impossible for the taxpayer to live within reasonable proximity to his work and therefore the expense was incurred away from home in pursuit of business.

During the years 1951 and 1954 appellant worked at seven different sites or "lay-outs" at distances of from 30 to 44 miles from his home, and because of the fact that part of this travel was over rough logging roads, he traveled four hours per day in driving from his home to said sites and return. Appellant could not live nearer his work because there were no living accommodations near his work, and his work was at temporary sites. The law is clear that a taxpayer has no duty to establish his home near a temporary

job-site, and that if he maintains his residence away from said temporary job-site and temporarily lives at the job-site, he can claim as an income tax deduction his board and lodging at the temporary job-site.

Thus, if appellant had temporarily lived at the job-sites, the legal authorities hold without exception that his traveling expenses between his home and each job-site, and room and board at the job-sites, would fulfill the three conditions of *Commissioner v. Flowers.*[1] Due to the absence of living accommodations at the job-sites, appellant's traveling expense was limited to the cost of transportation. If the cost of transportation, and room and board, are deductible under *Commissioner v. Flowers,* certainly the transportation expense incurred alone meets the requirements of that decision.

Appellant could not live nearer his work because of the nature of his work and the nature of the industry in which he was engaged. Thus, in both the

[1]*Schurer v. Commissioner,* 3 T.C. 544;
Leach v. Commissioner, 12 T.C. 20;
Cooper v. Commissioner, 12 T.C.M. 471;
Robert B. Denning, 14 T.C.M. 838;
J. G. Frazier, Jr. v. Commissioner, 12 T.C.M. 1129;
Stegner v. Commissioner, 14 T.C.M. 1081.

Thus, in *Schurer v. Commissioner, supra,* a journeyman plumber who accepted temporary employment at three different sites during the year, and returned home at the end of each day, was permitted to deduct the amount spent for board and lodging and railroad and bus fares. In *Leach v. Commissioner, supra,* a construction worker was employed for 49 weeks in a single year at places so sufficiently remote from his home that he rented lodgings at each place, and the Tax Court held the lodgings were deductible. Similar principles were applied in *Cooper v. Commissioner, supra, Denning v. Commissioner, supra, Frazier v. Commissioner, supra,* and *Stegner v. Commissioner, supra.*

Emmert case and in the instant case it was necessity that occasioned the daily travel, and not personal desire, choice or convenience. The Tax Court has fallen into the basic error of seizing on the reason for the necessity rather than the necessity itself, as the basis of its decision.

Furthermore, appellant lived in Fort Bragg, which was the place most centrally located with respect to his various "lay-outs" (R. 137-138). Appellant traveled 42-44 miles northerly to his job-sites in 1951 (R. 43; 164-165); 30 miles easterly to two job-sites in 1954 (R. 69-70); 41 to 44 miles southeasterly to three of his other job-sites in 1954 (R. 73-75). He was therefore as centrally located as possible to his various temporary job-sites and thus minimized the expenses of traveling.

In *Moss v. United States* (1956), 145 F. Supp. 10, the taxpayer was a Public Service Commissioner of the State of South Carolina, and, as in *Emmert v. United States, supra,* the taxpayer resided in one district, because the law required that he live in the district in which he was elected, but performed substantially all of his services at the state capital, where the Public Service Commission maintained its offices and its stenographic and technical staffs. The Court held that Moss could deduct his expenses of traveling from his residence to the state capital and return and in addition his board and lodging expenses at the state capital, and said at p. 13:

> "He did not maintain his abode in York away from the offices of the Public Service Commission

in Columbia, for reasons of personal choice or convenience."

The earliest memorandum opinion or ruling appellants have been able to find on the subject of commuting is *Solicitor's Memorandum* 1048, 1 C.B. 101 (1919).

And at p. 102, after discussing what is or is not an expense, the memorandum then states:

"Does the expense incurred by the commuter for transportation to and from his employment meet the test above set forth? Obviously, an individual is free to fix his residence wherever he chooses. He chooses it according to his personal convenience and inclinations, as a matter separate and apart from his business. * * * If he prefers, for personal reasons, to live in a different city from that in which his business or employment is located, any expense incident to so doing is the result of decision based upon personal convenience. * * * "

In *Barnhill v. Commissioner,* 148 F. 2d 913, the Court said at p. 93 relative to the general rule that the cost of going to and from work is not deductible:

"But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of business, but by the action of the taxpayer in having his home, for his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and are not within the contemplation of Congress, which proceeds upon the as-

sumption that a businessman would live within a reasonable proximity to his business."

The entire gist of the above ruling and decision is that commuting expenses are disallowed because there is no business need for such expenses. It is a free choice of a taxpayer to commute, and he chooses to commute for his personal convenience and inclination. A commuter is one who commutes. Commute means "to travel by use of a commutation ticket, esp. daily to and from a city; hence, to travel, esp. daily to one's work back and forth between a city and one's suburban residence." (*Webster's New International Dictionary, 2nd Edition, Unabridged.*)

Appellant did not travel from the suburbs to a city or from a city to the suburbs. He traveled from his "tax home" to distant temporary job-sites. The key word here is of course "tax home." A travel expense is deductible if incurred while a taxpayer is "away from home" (*Sec. 23(a)(1)(A)—1939 I.R.C.*). What is "away from home"? The Tax Court[2] and the administrative rulings[3] have consistently defined "home" as the taxpayer's place of business. This Honorable Court defined it as the taxpayer's residence.[4] In *Commissioner v. Flowers, supra,* the Su-

[2]*Tracy v. Commissioner,* 39 B.T.A. 578;
Preddy v. Commissioner, 43 B.T.A. 18;
Schurer v. Commissioner, 3 T.C. 544;
Gustafson, 3 T.C. 998.

[3]I T 1264, I—1 Cum. Bull 122 (1922);
I T 3314, 1939-2 Cum. Bull. 152;
G.C.M. 23672, 1943 Cum. Bull. 66.

[4]*Wallace v. Commissioner* (9th C.A.), 144 F. 2d 407.

preme Court referred to the administrative rulings as follows, at p. 253:

> "Sec. 19.23(a)-2 of Treasury Regulations 103 does not attempt to define the word 'home' although the Commissioner argues that the statement therein contained to the effect that commuters' fares are not business expenses and are not deductible necessarily rests on the premise that home for tax purposes is at the locality of the taxpayer's business headquarters."

The Supreme Court said further at p. 254:

> "Business trips are to be identified in relation to business demands and the traveler's business headquarters."[5]

Where was appellant's place of business or "business headquarters" in 1951 and 1954? In this regard, a letter ruling of the Commissioner of Internal Revenue of May 4, 1956 (Par. 76,519 of 1956 Prentice-Hall Federal Taxes) will be of great aid to this Court. Said ruling provides in part as follows:

> "If such a taxpayer's employment is temporary and so widely scattered that there is no particular city or other reasonably confined area in which he usually works, then his business headquarters may be considered as his 'tax home.' Such factors as the location of a taxpayer's residence, the place where he makes his employment contract, and the locality to which he returns on the termination of temporary employment should be taken into consideration in determining whether the

[5]Unfortunately the Supreme Court did not define "home" in its decision.

> taxpayer has such a business headquarters. * * * If a non-itinerant construction worker has no particular city or other reasonably confined area where he usually works, the cumulative effect of all the facts set out in the paragraph will, it is believed, show that the taxpayer has a business headquarters which may be considered his 'tax home.' "

Appellant's residence was located in Fort Bragg. Fort Bragg was centrally located for securing temporary assignments as a faller and bucker, and appellant sought work by driving approximately 50 miles in each direction from Fort Bragg to secure jobs or to the job-sites after he secured jobs. Certainly Fort Bragg was appellant's business headquarters. The locations of each of his temporary "lay-outs" were not his business headquarters, for if an employee's place of temporary assignment becomes his business headquarters, no employee could ever have a deductible travel expense. Obviously, if the employee's place of temporary assignment becomes the employee's business headquarters and therefore the employee's "tax home," the employee could never be away from home, and since travel expenses are only deductible when an employee is away from home, travel expenses would be denied to every employee. We respectfully ask counsel for respondent these questions:

1. If appellant's business headquarters were not located in Fort Bragg, where were they located?

2. If appellant's tax home was not in Fort Bragg, where was it located?

The letter ruling of May 4, 1956, recites further:

> "The facts may show that the taxpayer (1) has a 'tax home' (his usual place of employment or in the absence thereof, his business headquarters); and (2) is temporarily employed away from such 'tax home.' Where the expenses involved are those incurred for transportation between the 'tax home' and a temporary employment location (or between employment locations) and for meals and lodging at such a temporary location, they are incurred in pursuit of business."

This last quotation from the ruling clearly establishes that if appellant lived at each of the temporary job-sites, his expenses for transportation between his business headquarters, to wit, his residence, and the "lay-outs," and his expenses for meals and lodging, had any been incurred at the said "lay-outs," would be deductible. Certainly the fact that he incurred no meal and lodging expense cannot be the basis for depriving him of a deduction for his transportation expenses.

The Commissioner of Internal Revenue applied similar principles in another ruling (Rev. Ruling 190, 1953—2 C.B. 303). In connection with this ruling the Commissioner was asked whether construction workers who incurred daily transportation expenses between a metropolitan area in which they lived and ordinarily worked and a construction project outside said metropolitan area could take an income tax deduction for such daily transportation expenses. The Commissioner ruled that said expenses were deductible. This ruling is undoubtedly based on the fact

that the workers had a permanent job in the metropolitan area and therefore said area constituted their "tax home" and therefore the daily travel expenses between their "tax home" and temporary job-sites which were outside the limits of their "tax home" were deductible.

Appellant had no permanent job in a metropolitan area, and no permanent job anywhere, and, as has been shown above, his "tax home" was in Fort Bragg. Daily travel between his "tax home" and his temporary job-sites, which were located far outside the equivalent of a metropolitan area, must therefore also be deductible.[6] Certainly if a construction worker who has a "tax home" in San Francisco because his permanent job is located in San Francisco can deduct his daily transportation costs to a temporary job-site outside the San Francisco metropolitan area, another worker, who has a "tax home" in San Francisco because his business headquarters are located in San Francisco, similarly has the right to deduct his daily transportation costs to a temporary job-site or tem-

[6]That appellant traveled a sufficient distance each day so as to be away from home is supported by the following decisions and rulings:

Waters v. Commissioner, 12 T.C. 414 (a distance of 36 miles was held to be away from home);

Chandler v. Commissioner, 226 F. 2d 467 (a distance of 37 miles was held to be away from home);

Emmert v. United Sttaes, supra (a distance of 30 miles was held to be away from home);

Treasury Department Publication No. 300, *supra* (a distance of 20 miles was deemed to be away from home).

In *Chandler v. Commissioner of Internal Revenue, supra,* taxpayer, a school teacher, was permitted a deduction for the cost of

porary job-sites outside the San Francisco metropolitan area.

In Treasury Department Publication No. 300 (Par. 76,425) 1956 Prentice-Hall Federal Taxes, the Treasury Department stated that the

> "* * * cost of transportation between your residence and your place of employment or business, including commuting expenses, are not deductible except in special circumstances"

and that

> "* * * travel expenses do not include * * * the cost of commuting between the hotel or other place where meals and lodging are obtained and the business location where the services are performed,"

but that

> "* * * however, if the location where the services are performed while on a business trip is in a remote area and you must stay at a considerable distance therefrom (for example, 10 to 15 miles) in order to obtain necessary living accommoda-

traveling to and from a night school teaching job located 37 miles from the city in which the taxpayer lived and in which he was employed as a school teacher during the day. The Commissioner agreed that the cost of such daily travel in connection with the night job was deductible, but the only question was whether the deduction would be permitted before or after adjusted gross income. That such expenses are of course deductible is unquestioned. They represent the cost of travel between the taxpayer's "tax home" (the place where he was regularly employed) and his place of secondary employment. Such expenses were unavoidable since obviously the taxpayer could not live within reasonable proximity to both jobs. These are the same compelling principles which must permit appellant herein to deduct his daily transportation cost.

> tions, the expense incurred for necessary transportation may be deducted.[7]
>
> * * * * * * *
>
> If you are required to work at a temporary or minor location outside the general area which is your 'tax home,' your transportation expenses for daily round-trips from that area to such temporary or minor post of duty are deductible."

The said Publication No. 300 then gives the example of an employee who has a "tax home" in Nashville, Tennessee, because that is the place of his permanent employment, and said employee is then required to work at a temporary project 20 miles outside the city of Nashville, requiring the employee to incur daily transportation in driving from Nashville to the project and return. The publication makes it clear that the employee may deduct such daily transportation expenses.

Thus, Treasury Department Publication No. 300 clearly recognizes that the cost of traveling between one's residence and one's job is deductible where special circumstances are present. It recognizes that where there are daily transportation expenses between one's "tax home" and a temporary or minor location outside the "tax home," the employee may deduct the cost of such daily round-trips. It recognizes that a distance of 20 miles is of sufficient length to constitute

[7]Revenue Ruling 54-497, 1954—2 C.B. 75 also provides that where an employee is working at a temporary post of duty, and the temporary post of duty is located in a remote area and the employee must travel 10 or 15 miles to the nearest location where he can obtain living accommodations, transportation expenses so incurred are deductible.

working outside the area of the "tax home." On the basis of this Treasury Department Publication, appellant is completely sustained in his right to deduct his daily transportation costs incurred in driving from 30 to 44 miles from his "tax home" to his place of temporary employment.

Par. 1352 of the Commerce Clearing House 1959 Standard Federal Tax Reporter cites the Commissioner's rules applicable to temporary workers as follows:

> "If you are required to work at a temporary or minor location outside the general area which is your 'tax home,' your transportation expenses for daily round-trips from that area to such temporary or minor post of duty are deductible. For example, an employee who normally works in the city is temporarily assigned to work on a project 20 miles distant from that city, making daily round-trips to his job. The I.R.S. explains that in such case the taxpayer could deduct the transportation expenses for these daily trips, provided the employer did not provide free transportation."

We appreciate that a reference from a tax service is not binding upon this Court, but cite it merely to show that the conclusions we have drawn from the decisions and rulings cited in this brief are the same conclusions drawn in said tax service. Appellants have cited many decisions and rulings which clearly support the right of appellants to deduct the portion of transportation costs allocable to appellant's traveling daily between his home and his work. We assert that respondent cannot cite any decision or ruling to sup-

port its position that such expenses are not deductible. We are aware of the fact that respondent can cite cases which have stated the general rule that the cost of going to and from work is not deductible. It is certainly undeniable that this general rule is subject to exceptions, and in particular the many exceptions referred to in this brief. So we ask respondent not to cite cases which have established the general rule, but rather to cite some decision, some ruling, some authority, to support its contention that a taxpayer who must travel daily a distance of from 30 to 44 miles from his "tax home" to a temporary job-site and return cannot deduct the cost of such transportation. Cases involving long-range voluntary commutes or involving transportation between a man's residence and his permanent place of employment, or travel within the confines of a metropolitan area, are obviously all distinguishable from the facts of the instant case, and if cited to this Court by respondent are of no assistance to the Court. We therefore respectfully urge that, to assist the Court, respondent cite authorities in point with the facts of this case.

II. THE TAX COURT SHOULD HAVE HELD THAT THE 1951 NOTICE OF DEFICIENCY WAS EXCESSIVE AND ARBITRARY AND THEREFORE UNLAWFUL.

Appellants were not furnished with a 30-day letter or auditor's report of proposed adjustment for 1951 (R. 31). No excuse for this failure was offered by respondent. Neither appellants nor their representatives were interviewed by respondent. No request was

made of appellants to sign waivers extending the statute of limitations.

In the absence of any other explanation, the only reasonable inference is that respondent made the deficiency determination for 1951 to avoid the statute of limitations. The question is whether such arbitrary action on the part of respondent should have been sustained by the Tax Court.

The rules for "Procedure for Informal Conference under Reorganization Plan No. 1 of 1952" (see Paragraph 21005—Prentice-Hall 1956 Federal Taxes) provide for the issuance of a 30-day letter together with the auditor's report of proposed adjustments. The taxpayer is given an opportunity to protest and to have the matter heard by the Appellate Division. The various District Directors of Internal Revenue are given the right to depart from this procedure only as follows:

> "10. Nothing contained in this mimeograph shall be construed to preclude the taking of appropriate action where the assessment or collection of the tax is in jeopardy. The procedure described in this mimeograph will not apply in any case in which criminal prosecution is under consideration or in any case in which, in the discretion of the Director of Internal Revenue, the Government's interest would be prejudiced."

In this connection, it should be noted that Regulations and Treasury Decisions on matters of administration of procedure or exercising a discretion conferred by statute have all the force and effect of law, to the same extent as the statute itself *(Stegall*

v. Thurman, 175 F. 813). There is no question but that the Commissioner of Internal Revenue was acting within his authority in promulgating the procedural mimeograph here involved. The procedure therefore must be followed unless the Director of Internal Revenue in a proper exercise of his discretion departs from the procedure to protect the Government's interest. Where such an issue is raised by appellants, respondent is obligated to present facts to show whether or not the discretion was abused. No facts were offered.

Is this discretion of the Director unlimited? Can the local Director of Internal Revenue on April 15, 1959, arbitrarily send notices of deficiency to various taxpayers chosen at random in this district, disallowing percentages of their deductions claimed on their 1955 income tax returns because of the impending running of the statute of limitations for the year 1955? The effect of such an exercise of discretion would be to force the Tax Court instead of the Internal Revenue Service to audit the taxpayers' returns and to clog the Tax Court calendar.

How can the courts compel the Internal Revenue Service to issue notices of deficiency only upon proper investigation? Past criticism of the Internal Revenue Service for improper practices has worked no magic and never will. Only when the courts inform the Internal Revenue Service that no deficiencies will be sustained where such notices were issued arbitrarily merely to keep the statute open, will such practices cease. Was the notice issued arbitrarily in this case?

No investigation, no audit, no examination of records, no interview of appellants or their representative, no request for waiver of the statute of limitations, no 30-day letter, no audit report,—all spells arbitrary action. Appellants recognize that the courts have held that where the Commissioner is conducting an audit, and the impending running of the statute of limitations does not allow an orderly conclusion to that audit, the Commissioner can issue his notice of deficiency to avoid the running of the statute. In this case no audit was ever commenced.

It may be argued that the trial before the Tax Court gave appellants their day in court, and therefore the harm done by the arbitrary assessment was eliminated. However, in *Helvering v. Taylor,* 293 U.S. 507, 55 S. Ct. 287, the Court said at p. 290:

> "We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or if liable at all, shows the correct amount."

In the *Helvering v. Taylor* case and in kindred cases, the Court's conclusions were generally based on an arbitrary determination of gross income, but an arbitrary determination of deductions or of gross income results in an equally arbitrary taxable income, and said Supreme Court decision must therefore apply to deductions denied on an arbitrary or irrational basis as well as to gross income determined in such a manner.

In the instant case, in order to determine the deductibility of appellant's cost of transportation between his "tax home" and his various job-sites, it was necessary to know the facts concerning the distance he traveled daily, whether the long distance traveled was traveled because of personal choice and convenience or was due to a necessity created by the nature of his job and the industry in which he was employed, whether each job was of temporary or permanent duration, and all the other factors hereinbefore discussed. None of this information could possibly have been known to the Internal Revenue Service at the time the notice of deficiency was issued, for no investigation had been made. Yet with this complete lack of information, the respondent's agents disallowed 80% of the automobile and other expenses claimed for 1951. This percentage disallowance, based on no facts, then cast upon appellants the cost and the effort involved in filing a petition in the Tax Court to attempt to prove they did not owe the taxes so arbitrarily claimed from them. Such actions on the part of the Internal Revenue Service cannot possibly be sustained by the Courts.

If the Internal Revenue Service had known the facts in 1951, would it have arrived at the same conclusions as it did, acting without information? The answer is in the record. For the taxable year 1954, the Internal Revenue Service made some investigation. As a result, respondent did not disallow any of appellants' deduction for gas and oil, which deduction covered the gas and oil used by appellant in driving from his "tax home" to his various job-sites and

return (R. 170). In 1951, when no investigation was made, the Commissioner disallowed 80% of such expenses (R. 169). In 1954, respondent disallowed approximately 40% of appellant's depreciation and repair expenses in connection with his jeep (R. 170). For the year 1951, the Commissioner allowed not one cent of deduction for the 1937 Plymouth which was used for precisely the same purposes as the jeep (R. 169). For the year 1954, respondent was apparently satisfied that appellant was entitled to deduct the cost of driving from his "tax home" to the job-sites and return, as otherwise respondent obviously would have disallowed some portion of the gas and oil expense claimed! Respondent did disallow 40% of the jeep depreciation and repair expense, which at first blush is inconsistent with the 100% allowance of the gas and oil expense. The notice of deficiency for 1941 refers to the disallowance of said jeep depreciation and repair expense only as "personal expense" (R. 25). The precise reason why respondent deemed said expense to be "personal expense" is not revealed. In any case, the 1954 notice of deficiency shows that respondent had grave doubts about the propriety of disallowing appellant's expenses in driving and using his automobile or other vehicle from his "tax home" to his job-sites and return daily.

As long as the Courts permitted prosecutors to use illegally obtained evidence in criminal cases and merely criticized the police and the prosecutors for improper practices, the police and the prosecutors trampled on constitutional rights and continued to obtain evidence illegally. Once the Courts realized

that wrist-slapping would not work and convictions secured through illegally obtained evidence would be reversed, the improper practices stopped.

We submit that the type of practice here involved will never stop so long as the Courts limit themselves to criticizing respondent. The practice will cease if the Courts refuse to sustain such deficiency determinations as they are made for 1951.

VI. CONCLUSION.

The decision of the Tax Court of the United States for the taxable year 1954 should be modified to allow appellants their proper deduction for automobile and other vehicle expenses for 1954. The decision of the Tax Court of the United States for the taxable year 1951 should be reversed because said decision sustained an arbitrary and unlawful notice of deficiency issued by respondent; or, in the alternative, the Court should modify the decision of the Tax Court for said year to allow appellants their proper deduction for automobile and other vehicle expenses for said year.

Dated, San Francisco, California,
February 25, 1959.

Respectfully submitted,
LEON SCHILLER,
MORRIS M. GRUPP,
Attorneys for Appellants.

No. 15,996

IN THE

United States Court of Appeals

For the Ninth Circuit

LEE HON LUNG,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellee.

On Appeal from the United States District Court for the District of Hawaii in Civil No. 1554.

APPELLEE'S ANSWERING BRIEF.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

By CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

Attorneys for Appellee.

FILED
JUL 17 1958
PAUL P. O'BRIEN, CLE

Subject Index

	Page
Jurisdictional statement	1
Statutes involved	1
Statement of facts	2
Documentary evidence	4
Questions presented	8
Summary of argument	9
Argument	9
I. Prima facie case is a minimum amount of proof	9
II. There were no eyewitnesses to appellant's birth	11
III. Was it error to admit the ship's manifest when appellant clearly claimed entries therefrom as his?	11
IV. Is inspector Schmolt's letter material to this manifest?	12
V. Were the admissions of defendant's exhibits 2, 3, 4, 5, and 7, error?	12
VI. The court did not err in refusing to grant a new trial	13
Conclusion	13

Table of Authorities Cited

Cases

	Pages
Baumgartner v. U. S., 332 U.S. 665	10
Louie Hoy Gay v. Dulles, 248 F.(2d) 953	9, 10
Ly Shew v. Dulles (9 Cir. 1954), 219 F.(2d) 413	10
Mah Toi v. Brownell (9 Cir. 1955), 219 F.(2d) 642	9, 10

Statutes

28 USC 1291 and 1294(1)	1
§ 360(a), Immigration and Nationality Act of 1952 (8 USC 1503)	1

No. 15,996

IN THE

United States Court of Appeals

For the Ninth Circuit

LEE HON LUNG,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellee.

On Appeal from the United States District Court for the District of Hawaii in Civil No. 1554.

APPELLEE'S ANSWERING BRIEF.

JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement of Appellant except that the jurisdiction of this Court rests on 28 USC 1291 and 1294(1).

STATUTES INVOLVED.

There is no statute involved other than §360(a), Immigration and Nationality Act of 1952 (8 USC 1503).

STATEMENT OF FACTS.

Appellee disagrees with Appellant's statement of facts and consequently sets forth his own.

Appellant claims birth in Honolulu, Hawaii, on April 4, 1899 (R. 56, Tr. 3). He claims that his parents are Lee Leong Hou and Lee Leong Shee (R. 56, Tr. 3). He claims to have one brother, Lee Hon Fong, now deceased (R. 56-57, Tr. 3-4). He claims further that he returned to China in 1899 when he was seven months old (R. 57, Tr. 4). Appellant claims he returned to Honolulu in 1923 (R. 57, Tr. 4). Appellee admits Appellant arrived in Honolulu in 1923 and was admitted by a Board of Special Inquiry as a citizen of the United States (R. 9-10), see also (R. 57-59, Tr. 4-6), plaintiff's Exhibit A.

At that time two witnesses, as well as Appellant, testified that he was born in Honolulu. None of them purported to be eyewitnesses to his birth, or to have specific knowledge of his birth (Pl.'s Ex. A). There was submitted to the Court attached to an affidavit, a record of Board of Special Inquiry hearing on Lee Hon Fong, alleged brother of Appellant, taken August 6, 1923 (R. 29-35). Witness Lee Chong testified (R. 31) and witness Lee Koon Chong testified (R. 32). As to the Appellant, their testimony was of the same character as that given in his hearing. They did not claim to be eyewitnesses to his birth (R. 31-32), nor did they claim to have specific knowledge concerning his birth. Their testimony amounts to the rankest sort of hearsay.

Appellant testified that he left Hawaii in 1899 (R. 57, Tr. 4) on the Hong Kong Maru on November 8 (R. 65, Tr. 12). He would not positively identify defendant's Exhibit No. 1 (R. 67-69, Tr. 14-16).

He was not able to identify the pictures on defendant's Exhibits Nos. 2 and 3 (R. 71, Tr. 18), nor the pictures attached to defendant's Exhibits Nos. 4 and 5 (R. 72, Tr. 19). He denied that the pictures depicted his mother and father (R. 72, Tr. 19). He further testified that the person who left on the Hong Kong Maru on November 8, 1899 for China was his father under the name of Leong How (R. 75, Tr. 22; R. 76-77, Tr. 23-24) and that the person who left on the Hong Kong Maru on November 8, 1899 as Mrs. Leong How was his mother (R. 75, Tr. 22). He testified he was the younger of the two brothers who went back on the Hong Kong Maru on November 8, 1899 (R. 76, Tr. 23) and that he was one of the two children of Leong How who left at that time (R. 77, Tr. 24). He also stated the two children were brothers (R. 77, Tr. 24). That his older brother left with him on the Hong Kong Maru on November 8, 1899 (R. 78, Tr. 25). He stated he presented a departure record—from the Archives of Hawaii, to the Immigration Service in 1936 when he applied for a Certificate of Citizenship—Hawaiian Islands (R. 66, Tr. 13; R. 81, Tr. 28; R. 82, Tr. 29). He testified that he claimed the departure record entries on the manifests of the SS Hong Kong Maru leaving the Hawaiian Islands on November 8, 1899 of Leong How, Mrs. Leong How, child and infant (R. 83, Tr. 30; R. 85,

Tr. 32). He denied that he used the name Leong Hang Yau (R. 84, Tr. 31). He stated that he did not know whether Leong Hang Wah and Leong Hang Yau left on the Hong Kong Maru on November 8, 1899 as the child and infant of Mr. and Mrs. Leong How. (R. 84, Tr. 31), although the Appellant steadfastly claims that that departure record relates to him (R. 85, Tr. 32; R. 83, Tr. 30).

He further testified that his father and mother lived with him in China until his return in 1923 (R. 70-71, Tr. 17-18). He further testified his mother and father never returned to Hawaii (R. 71, Tr. 18).

Appellant testified that he applied for a passport which was denied. (R. 60-64, Tr. 7-11; see also plaintiff's Exhibit No. 2 admitted in evidence, (R. 62, Tr. 9).)

As to Appellant's credibility, the following statements as to his discussions concerning this case should be noted: (R. 78, 79, Tr. 25, 26; R. 87-88, Tr. 34-35).

DOCUMENTARY EVIDENCE.

Plaintiff's "A"—Plaintiff's Exhibit "A" shows some very interesting characteristics. First of all, not one witness, other than the Appellant (applicant then) testified as to any particulars concerning his birth. Not one of them held themselves out to be eyewitnesses to the birth. See page 3 of the hearing. It is also interesting to note that three witnesses' testimony is contained on one page.

Consequently, the *prima facie* case, if indeed there be one, rests on the rankest kind of hearsay.

The same can be said for the hearing found attached to Affidavit of Charles B. Dwight III, furnished in conjunction with the motion for new trial which was denied by the trial court (R. 39, 41).

It is to be noted further that Appellant's testimony covers exactly one and one-fourth pages.

The questions of interest to this inquiry are found on page 2 of Appellant's testimony (Plaintiff's Exhibit "A"):

Q. Your parents living?
A. Yes.
Q. Names and ages?
A. Father Lee Leong How, alias Lee Choy Ngit, 55; mother Leong She, 45.

* * * * *

Q. What kind of feet has your mother?
A. Natural feet.

* * * * *

Q. What did your father do in Hawaii?
A. I do not know.
Q. When did you go to China?
A. K.S. 25, when I was 4 or 5 months old, on the Hong Kong Maru.
Q. Who went with you?
A. My parents and brother.
(K.S. 25 converted to Gregorian calendar is 1899.)

He states that he left with his parents and his brother, and that his parents' names were Lee Leong How and Leong She—names and family makeup which coincide

exactly with the departure record which Appellant attempts to repudiate.

Defendant's Exhibit No. 1—Departure record taken from file of one Lee Hon Lung—Appellant was skittish concerning this document. He would not positively identify it (R. 67-69, Tr. 14-15), although he steadfastly claims the departure record set out in this exhibit (R. 83, Tr. 30; R. 85, Tr. 32); and that he took a departure record from the Archives of Hawaii to the Immigration Service in 1936 (R. 66, Tr. 13; R. 81, Tr. 28; R. 82, Tr. 29). However, the document is (1) a certificate from the Archives of Hawaii, (2) it bears the date July 22, 1936, (3) and it contains the departure record claimed by Appellant at the trial. It also coincides with the entries on the manifest. Exhibit 6 (pages 3 and 4), which he claimed at the trial (R. 83, Tr. 30; R. 85, Tr. 32).

Defendant's Exhibits Nos. 2, 3, and 7—Defendant's Exhibits Nos. 2 and 3 are affidavits of Chinese laborers. These affidavits served the same purpose as reentry permits do today. Chinese laborers secured these to facilitate reentry into the United States (R. 107-108, Tr. 54-55).

The two affidavits are for Leong How and Mrs. Leong How, the same names as appear on the manifest, Exhibit No. 6, and in the Chinese laborers permit book (Exhibit No. 7). The numbers of the affidavits, No. 10446 and No. 10447, coincide with the numbers in the permit book (Exhibit No. 7). Further, the permit book (Exhibit No. 7) shows in the departure

column the departure date of November 8, 1899, Hong Kong Maru (R. 107, Tr. 54). Since the numbers tie up the permit book and the permit book (Exhibit No. 7) with the date of departure and the manifest, the inescapable conclusion is that Mr. and Mrs. Leong How, as pictured in the laborers' affidavits, are the rightful owners of the departure record claimed by Appellant.

This fact has also become painfully true to Appellant, hence the great effort to pass off this claim of the departure record as a big mistake.

What has happened to the Appellant is not "all a big mistake." He has merely been caught up in his pattern of fraud. In connection with this, the testimony of the Appellant is called to the attention of the Court concerning the photographs of Mr. and Mrs. Leong How (R. 71, Tr. 18; Tr. 2, 3) and the claim that those persons are his parents (R. 75, Tr. 22; R. 76-77, Tr. 23-24). It is quite apparent that one does not fit with the other.

Defendant's Exhibits Nos. 4 and 5—These two exhibits, namely, the Certificate of Residence (Exhibit No. 4), and the Form 432 (Exhibit No. 5), concern the subject of Exhibit No. 3. The similarity of photographs and of the identifying data relate them definitely to the same person and, more importantly, to the departure record claimed by the Appellant. Appellant is unable to identify these photographs as those of his father since, really, these photographs are not of his father, but only of a person claimed by him

for the fraudulent purpose of establishing a departure record for himself and also for an inference from this fact that he must have been born in Hawaii.

The Appellee contends that the basis for the Appellant's claiming the departure record which he does, has been destroyed by Appellant's testimony in connection with the documentary evidence.

Defendant's Exhibit No. 6—This exhibit is the photograph of the original manifest of the Hong Kong Maru, leaving Honolulu *November 8, 1899.* The Appellant has attempted to attack this, and as a matter of fact, all manifests, on the ground that it is unreliable. There is no evidence to that effect whatsoever in the record. As a matter of fact, Mr. Choy, Archivist Clerk, testified that this had not been his experience—that he had not found them to be unrelible (R. 98, Tr. 45). He was in no way shaken in his testimony.

The manifest clearly shows, beginning on page 3 and ending on page 4, the entries claimed by the Appellant herein (R. 83, Tr. 30; R. 85, Tr. 32).

QUESTIONS PRESENTED.

1. Is a *prima facie* case a minimum quantity of evidence?

2. Were there eyewitnesses to Appellant's birth in Hawaii?

3. Was it error to admit the ship's manifest when Appellant had clearly claimed entries therefrom?

4. Inspector Schmolt's report—was it error not to admit it?

5. Should a new trial have been granted?

SUMMARY OF ARGUMENT.

This case is strictly a factual one depending on the credibility of the Appellant and the application of documentary evidence to the facts. Appellant has raised objections to the admission of certain documents all of which are without merit. He also challenges the holdings of this Court in *Mah Toi v. Brownell* (9 Cir. 1955), 219 F. (2d) 642, and *Louie Hoy Gay v. Dulles,* 248 F. (2d) 953, as to the strength of a *prima facie* case. All of the documents are admissible. The Court has found the statements of the Appellant to be completely unreliable and the *prima facie* case herein, if there be any, is very weak.

ARGUMENT.

I.

PRIMA FACIE CASE IS A MINIMUM AMOUNT OF PROOF.

The recent decisions of this Court, *Mah Toi v. Brownell* (9 Cir. 1955), 219 F. (2d) 642, and *Louie Hoy Gay v. Dulles,* 248 F. (2d) 953, held that *prima facie* cases are minimum quantities of proof necessary to sustain Appellant's case. Appellant depends on two things herein: (1) his testimony, which the Dis-

trict Court found to be not worthy of belief (R. 15, 39); (2) the *prima facie* case established by Appellee's admission (R. 39).

The next question to follow is: what does appellant's *prima facie* case consist of? It consists of (1) his testimony in 1923; (2) the testimony of two witnesses who do not purport to be eyewitnesses, and a departure record (R. 35). The Court has found the Appellant's statements to be completely unreliable (R. 15). The departure record which Appellant states is "wrongly chosen", and the testimony of *two witnesses.* The two witnesses have not testified as to specific circumstances as to this Appellant; as a matter of fact, all they say as to him is that he was born in Hawaii. This becomes the rankest kind of hearsay. It appears here that the *prima facie* case is a very bare minimum amount of proof. Further, Appellant has the burden of proving his case by a preponderance of the evidence.

It is apparently the law of this circuit that the defendant in this type of case has no extraordinary burden of proof. *Ly Shew v. Dulles* (9 Cir. 1954), 219 F. (2d) 413; *Mah Toi v. Brownell, supra;* and *Louie Hoy Gay v. Dulles, supra.* This is not the case of a person whose citizenship is being taken away in a denaturalization proceeding (*Baumgartner v. U. S.,* 332 U.S. 665), or whose citizenship is admitted except for alleged acts of expatriation. The real issue in this case is the Appellant's identity as a U. S. citizen. Appellee's evidence, together with the insubstantiality of Appellant's proof, reveals that the Trial Court

committed no error. That the evidence presented did not preponderate in favor of the Appellant.

II.

THERE WERE NO EYEWITNESSES TO APPELLANT'S BIRTH.

If there were eyewitnesses to Appellant's birth, wherever it may have taken place, none of them testified on behalf of Appellant (Plaintiff's Exhibit "A", R. 29-35). To carry this a little further, not one of the witnesses testified that he saw Appellant in Hawaii prior to his alleged departure (Plaintiff's Exhibit "A", R. 29-35).

III.

WAS IT ERROR TO ADMIT THE SHIP'S MANIFEST WHEN APPELLANT CLEARLY CLAIMED ENTRIES THEREFROM AS HIS?

On cross-examination, the Appellant testified as follows:

> Q. Do you claim as your departure record, entries on the manifests of the SS Hong Kong Maru, leaving the Hawaiian Islands on November 8, 1899, of Leong How, Mrs. Leong How, child and infant?
>
> A. Yes. (R. 83, Tr. 30.)

Certainly the manifest is material to show whether those entries so appear. Further, without deciding the questions of reliability of the manifest, Appellant has singled out a specific one as his own. As a matter of

fact, he seems to have claimed this departure record consistently (R. 35; R. 82, Tr. 29; defendant's Exhibit No. 1; R. 83, Tr. 30).

IV.

IS INSPECTOR SCHMOLT'S LETTER MATERIAL TO THIS MANIFEST?

The letter, as read into the record, shows that it is immaterial to this case. First, the manifest itself does not bear any notations as set out therein. Secondly, the Appellant himself has selected this departure record and claims it. Whether other manifests might be unreliable, has no bearing here where Appellant has chosen specific items on this manifest. Further, the letter could only have been used for collateral impeachment of Mr. Choy for answers given by him on cross-examination.

V.

WERE THE ADMISSIONS OF DEFENDANT'S EXHIBITS 2, 3, 4, 5, AND 7, ERROR?

Appellee respectfully represents that he is unable to see any connection between the questions set out in Appellant's Brief (Br. 19) and the admission of Defendant's Exhibits 2, 3, 4, and 5, which were documentary evidence tending to show that the departure record claimed by Appellant did not belong to him. Exhibit 7 is a document or part thereof, kept in the regular course of business (R. 107, Tr. 54). There

was no objection to any of these documents at the time of their admission (R. 108, Tr. 55; R. 109, Tr. 56). All of the documents certainly are material to the departure record.

VI.

THE COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL.

The previous argument concerning the eyewitnesses' testimony is incorporated herein. The Court did not err in denying the motion for a new trial.

CONCLUSION.

The trial court did not err. The Appellant has failed to carry his burden of proof by a fair preponderance of the evidence.

Dated, Honolulu, T. H.,
July 8, 1958.

Respectfully submitted,

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

By CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

Attorneys for Appellee.

No. 15,997

United States Court of Appeals

For the Ninth Circuit

WILLIAM DANIEL STRAIGHT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
United States Attorney,
GEORGE N. HAYES,
Assistant United States Attorney,
Anchorage, Alaska,
Attorneys for Appellee.

FILED
AUG 19 1958
PAUL P. O'BRIEN, CLERK

Subject Index

Page

Jurisdictional statement 1

Statement of the case 2

A. Pleadings 2

B. The facts 2

Questions involved 2

Argument 3

Error Number One.
Pages 6 and 29, Appellant's Brief.

The court erred in denying the motion for mistrial made after the complaining witness answered to the effect that she had taken a lie-detector test, on the ground that appellant was highly prejudiced thereby 3

Error Number Two.
Pages 6 and 30, Appellant's Brief.

The court erred in allowing the case to go to the jury on the ground that in a trial involving a sex offense, the complaining witness should be examined by a doctor and a psychiatrist 4

Error Number Three.
Pages 6 and 31, Appellant's Brief.

The court erred in instructing the jury as follows: "The essential elements which the government must prove to warrant conviction of the defendant of the crime charged in the indictment are: First, . . .; second, that between the 20th day of August, 1956, and the 20th day of September, 1956, at or near Palmer, Third Judicial Division, Territory of Alaska, the defendant carnally knew and abused Annetta Marie Straight; and . . ." R. Par. 6, p. 6 5

Error Number Four.
Pages 7 and 34-37, Appellant's Brief.

Court's instruction on scrutiny tests 5

Error Number Five.
Pages 8 and 37, Appellant's Brief. Page

Error of instruction pertaining to the court's admonition to jury to disregard statement of the prosecutor 6

Error Number Six.
Pages 9 and 38, Appellant's Brief.

Corroboration of female witness 6

Error Number Seven.
Pages 9 and 39-40, Appellant's Brief.

Instruction on legal presumptions, specifically that the normal period of gestation is 283 days 7

Error Number Eight.
Pages 9-10 and 40, Appellant's Brief.

The court erred in denying the motion for a new trial on the grounds mentioned therein 7

Error Number Nine.
Pages 10 and 40, Appellant's Brief.

Negligence of defense trial counsel in the conduct of the trial 7

Conclusion 8

Table of Authorities Cited

Cases

Booth v. United States, 57 F2d 192 (10th CCA 1932) 5

Davis v. United States, 78 F2d 501 (10th CCA 1935) 5

Hendrickson v. Overlade, Warden, 131 F. Supp. 501, U.S. D.C. South Bend Division (1955) 8

Hines v. Powell, 15 S.W. 2d 1060, Court of Civil Appeals, Texas (1929) 3

Jenkins v. United States, 58 F2d 556 (4th CCA 1932) 5

Leeks v. State, 245 Pac. 2d 764, Criminal Court of Appeals, Oklahoma (1952) 3

Norman v. United States, 100 F2d 905 (6th CCA 1939) 8

Sheperd v. United States, 62 F2d 683 (10th CCA 1933) 6, 7

Statutes

ACLA, 1949:

Section 65-1-3 6

Section 65-4-12 1, 2

28 U.S.C., Section 1291 1

No. 15,997

United States Court of Appeals
For the Ninth Circuit

WILLIAM DANIEL STRAIGHT,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted on the 30th day of April, 1957, after a jury trial in the District Court for the District of Alaska, Third Judicial Division, the Honorable J. L. McCarrey, Jr. presiding, of a violation of Section 65-4-12 ACLA 1949. The Court imposed a sentence of imprisonment for a term of nine years on the 30th day of July, 1957. The execution of said sentence has been stayed pending appeal to the United States Court of Appeals for the Ninth Circuit. Jurisdiction in this Court is conferred by Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE.

A. Pleadings.

An indictment was brought by the grand jury for the Third Judicial Division, District of Alaska charging the defendant with the crime of rape. The statute involved was Section 65-4-12 ACLA 1949.

B. The Facts.

During the early fall of 1956 defendant and his fourteen year old daughter went moose hunting. One of the nights during the trip the defendant had an act of sexual intercourse with his daughter. That act gave use to the indictment. The case was tried to a jury and the defendant was convicted.

QUESTIONS INVOLVED.

Appellant contends that during the course of the trial, prejudicial error was committed in the Court's rulings, conduct of the prosecutor, and the Court's instructions to the jury.

Appellee contends that the Court's rulings were correct, and that the conduct of the prosecutor was not such as to prejudice the defendant in view of the Court's instructions to the jury, and that the instructions were legally correct. Appellee further contends that appellant waived his right to complain upon appeal on several of the specifications of error for the reason that defendant failed to make timely objections at the time of trial.

ARGUMENT.

Defendant specifies assignments of error. (Appellant's Brief pp. 6-11 incl.) He argues his specifications of error on pages 24 through 41. He lists an "Argument on the Facts" on page 24 (Appellant's Brief) but assigns no error of law relating to the argument. Therefore the government will not argue defendant's "Argument on the Facts."

ERROR NUMBER ONE.

Pages 6 and 29, Appellant's Brief.

THE COURT ERRED IN DENYING THE MOTION FOR MISTRIAL MADE AFTER THE COMPLAINING WITNESS ANSWERED TO THE EFFECT THAT SHE HAD TAKEN A LIE-DETECTOR TEST, ON THE GROUND THAT APPELLANT WAS HIGHLY PREJUDICED THEREBY.

The government agrees with the defendant that the information adduced by the prosecutor (T 17) was improper. It should not have been asked. The Court corrected the error (T 20) by instructing the jury to disregard the answer. The statement made by the witness was not so prejudicial that an instruction by the Court could not cure it. Defendant cites *Hines v. Powell,* 15 S.W. 2d 1060 Court of Civil Appeals, Texas (1929). It is a civil case and the error is not at all similar to the present fact situation.

In *Leeks v. State,* 245 Pac. 2d 764, Criminal Court of Appeals Oklahoma (1952) several officers testified at great length in regard to the lie detector test given Hobart Darrel Leeks. The Supreme Court said that was prejudicial error. In the present case, the refer-

ence to such test was a one line statement by a witness, not an officer.

The prosecutor in the present case was directed by the Court not to continue questioning the witness concerning the test and the prosecutor refrained.

ERROR NUMBER TWO.

Pages 6 and 30, Appellant's Brief.

THE COURT ERRED IN ALLOWING THE CASE TO GO TO THE JURY ON THE GROUND THAT IN A TRIAL INVOLVING A SEX OFFENSE, THE COMPLAINING WITNESS SHOULD BE EXAMINED BY A DOCTOR AND A PSYCHIATRIST.

There is no requirement in the common law or in the Alaska statutes that the complaining witness be required to submit to a psychiatrist. The evidence in the present case did not indicate that such an examination was warranted. Counsel for the defendant had the opportunity to request the Court to have the witness examined had he believed it necessary. He did not do so. His cross-examination was quite short and brought forth no indication that the complaining witness was either mentally ill or lying.

ERROR NUMBER THREE.

Pages 6 and 31, Appellant's Brief.

THE COURT ERRED IN INSTRUCTING THE JURY AS FOLLOWS: "THE ESSENTIAL ELEMENTS WHICH THE GOVERNMENT MUST PROVE TO WARRANT CONVICTION OF THE DEFENDANT OF THE CRIME CHARGED IN THE INDICTMENT ARE: FIRST, . . .; SECOND, THAT BETWEEN THE 20TH DAY OF AUGUST, 1956, AND THE 20TH DAY OF SEPTEMBER, 1956, AT OR NEAR PALMER, THIRD JUDICIAL DIVISION, TERRITORY OF ALASKA, THE DEFENDANT CARNALLY KNEW AND ABUSED ANNETTA MARIE STRAIGHT; AND . . ." R. Par. 6, p. 6.

Defendant failed to make any objection to the Court's instructions at the time of trial. (R. 126.) Failure to make timely objections at time of trial results in waiver of any error conferred therein. *Booth v. United States,* 57 F2d 192 (10th CCA 1932); *Davis v. United States,* 78 F2d 501 (10th CCA 1935); *Jenkins v. United States,* 58 F2d 556 (4th CCA 1932).

Further, the element of time was not of the essence in the present case; the Court's instruction (R. par. 2, p. 5) which instructed that the exact date was not material provided the crime occurred within five years prior to date of indictment was merely explanatory by way of illustration of the fact that the exact date is not material. The two instructions are not in conflict.

ERROR NUMBER FOUR.

Pages 7 and 34-37, Appellant's Brief.

COURT'S INSTRUCTION ON SCRUTINY TESTS.

The defendant asked the Court to instruct the jury not to consider the remarks of the prosecutor about

scrutiny tests. The request appears (R. 127) and the requested instruction was given very nearly in defendant's own language. (R. 128.) Defendant cannot now complain. The defense counsel then stated the instruction by the Court was satisfactory. (R. 128.) The defendant cannot now complain. *Sheperd v. United States,* 62 F2d 683 (10th CCA 1933).

ERROR NUMBER FIVE.

Pages 8 and 37, Appellant's Brief.

ERROR OF INSTRUCTION PERTAINING TO THE COURT'S ADMONITION TO JURY TO DISREGARD STATEMENT OF THE PROSECUTOR.

It was requested by defense counsel. (R. 118.) The point is similar to assignment of error number four.

ERROR NUMBER SIX.

Pages 9 and 38, Appellant's Brief.

CORROBORATION OF FEMALE WITNESS.

In common law corroboration of female was not necessary in a rape case. Under various state statutes corroboration is required. However, Alaska law does not require corroboration. There is no statute on the subject. Hence the common law rule prevails. 65-1-3 ACLA 1949.

ERROR NUMBER SEVEN.

Pages 9 and 39-40, Appellant's Brief.

INSTRUCTION ON LEGAL PRESUMPTIONS, SPECIFICALLY, THAT THE NORMAL PERIOD OF GESTATION IS 283 DAYS.

The fact that a child was born of the act of sexual intercourse is of no consequence. Therefore, no instruction on it was necessary or even proper. Further, defendant did not even request it. *Sheperd v. United States, supra.*

ERROR NUMBER EIGHT.

Pages 9-10 and 40, Appellant's Brief.

THE COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL ON THE GROUNDS MENTIONED THEREIN.

This ground not argued by the defendant. Therefore, the government will not argue it.

ERROR NUMBER NINE.

Pages 10 and 40, Appellant's Brief.

NEGLIGENCE OF DEFENSE TRIAL COUNSEL IN THE CONDUCT OF THE TRIAL.

What appellant's counsel on appeal might have done if he were trial counsel is not a basis upon which to predicate error. Trial counsel is an able member of the bar and he exercised sound judgment in his trial of the case. In order to obtain reversal or a new trial of a cause on the ground of negligence on the part of the defense counsel, the incompetency must be of such a nature as to deprive the defendant of a fair trial and to reduce the trial to a farce or sham.

Hendrickson v. Overlade, Warden, 131 F. Supp. 501 U.S.D.C. South Bend Division (1955).

Where defense counsel was experienced and exercised good judgment, conviction will not be reversed. *Norman v. United States,* 100 F2d 905 (6th CCA 1939). There is no showing that defense counsel did not exercise sound judgment.

CONCLUSION.

The weight of the evidence supports the verdict of the jury. An Appellate Court sits in judgment on errors of law and may not substitute its own judgment based on the facts, unless as a matter of law there is insufficient evidence to warrant a conviction.

The errors defendant alleges were not prejudicial to him. The ruling of the Court were in accord with Alaska and federal law. The conviction should be sustained.

Dated, Anchorage, Alaska,
August 12, 1958.

Respectfully submitted,

WILLIAM T. PLUMMER,
United States Attorney,

GEORGE N. HAYES,
Assistant United States Attorney,

Attorneys for Appellee.

No. 15998

United States
Court of Appeals
for the Ninth Circuit

JAMES R. YOST, Appellant,

vs.

ALBERTA G. MORROW, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division

FILED
JUL 15 1958
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—7-11-58

No. 15998

United States
Court of Appeals
for the Ninth Circuit

JAMES R. YOST, Appellant,

vs.

ALBERTA G. MORROW, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer and Cross-Complaint..... 18

Exhibit A—Agreement Dated July 15, 1955, James R. Yost and C. A. Butcher..... 22

Answer to Counter-Claim and Cross-Complaint 28

Appeal:

Certificate of Clerk to Transcript of Record on 36

Designation of Record on (USCA)..... 171

Notice of 35

Statement of Points on (USCA)..... 168

Certificate of Clerk to Transcript of Record... 36

Complaint 3

Exhibit A—Chattel Mortgage Dated October 17, 1955, C. A. Butcher and Alberta G. Morrow to James R. Yost..... 10

Designation of Record Necessary for Determination of Appeal (USCA)..... 171

Judgment 33

Names and Addresses of Attorneys..... 1

Notice of Appeal..... 35

Statement of Points To Be Relied Upon (USCA) 168

Transcript of Proceedings and Testimony..... 37

Exhibits for Plaintiff:

1—Promissory Note in the Amount of $7,300.00, Dated Oct. 17, 1955, Signed by C. A. Butcher and Alberta G. Morrow 11-12
Admitted in Evidence..... 43

2—Chattel Mortgage Dated Oct. 17, 1955, C. A. Butcher and Alberta G. Morrow to James R. Yost.....10-17
Admitted in Evidence..... 43

3—Check Dated July 15, 1955 to C. A. Butcher for $800.00, Signed by James R. Yost 46

4—Check Dated Oct. 19, 1955 to C. A. Butcher for $6,500.00, Signed by James R. Yost 47

Witnesses for Plaintiff:

Stringer, John
—direct 78
—cross 82

Transcript of Proceedings—(Continued):

Witnesses for Plaintiff—(Continued):

Yost, James R.

—direct 42
—cross 49
—redirect 73, 77
—recross 75
—rebuttal, direct 141
—cross 146, 154
—redirect 160

Witnesses for Defendants:

Butcher, Clayton A.

—direct 84
—cross 105
—redirect 111, 112
—recross 115

Butcher, Grace A.

—surrebuttal, direct 164

Meier, Albert

—direct 138

Morrow, Alberta Grace

—direct 132

Parker, Pat

—direct 118
—cross 125
—redirect 130

NAMES AND ADDRESSES OF ATTORNEYS

DONART & DONART,
Idaho First National Bank Building,
Weiser, Idaho,

Attorneys for Appellant and Appellee,
James R. Yost.

ALLAN G. SHEPARD,
604 Idaho Building,
Boise, Idaho,

WM. R. PADGETT,
P. O. Box 2561,
Boise, Idaho,

Attorneys for Appellees and Appellant,
C. A. Butcher and Alberta G. Morrow.

In the District Court of the United States,
District of Idaho, Southern Division

No. 3270

JAMES R. YOST, Plaintiff,

vs.

C. A. BUTCHER and ALBERTA G. MORROW,
Defendants.

COMPLAINT

Comes now the plaintiff and complains of the defendants and for a cause of action against them alleges:

I.

That the plaintiff is a resident of and domiciled at the City of Nyssa in the County of Malheur, State of Oregon; that the defendant, C. A. Butcher, is a resident of and domiciled at the City of Parma, in the County of Canyon, State of Idaho; that the defendant, Alberta G. Morrow, is a resident of and domiciled in the County of Idaho, State of Idaho, and jurisdiction of the above entitled court in this action is grounded upon the diversity of citizenship of the parties hereto;

II.

That at Nyssa, Oregon and on or about October 17, 1955 for a valuable consideration the defendants, C. A. Butcher and Alberta G. Morrow, who then and there was and now is a widow, made, executed and delivered to the plaintiff their certain promissory note in writing, wherein and whereby they jointly and severally promised and agreed to pay to

the order of the plaintiff at Nyssa, Oregon, on or before April 15, 1956, the sum of Seven Thousand Three Hundred ($7,300.00) Dollars, lawful money of the United States of America, with interest thereon in like lawful money at the rate of Six (6%) per cent per annum from the date thereof until paid, which note was in words and figures as follows:

October 17, 1955

$7,300.00

On or before April 15, 1956 after date, for value received, we promise to pay to the order of James R. Yost at the First National Bank of Portland at Nyssa, Oregon Seven Thousand Three Hundred and 00/100 Dollars, in lawful money of the United States of America, with interest thereon in like lawful money at the rate of 6 per cent per annum, from date until paid. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for Attorneys fees to be allowed in said suit or action.

C. A. BUTCHER,
ALBERTA G. MORROW.

III.

That at Nyssa, Oregon and on or about the 17th

day of October 1955 and coincident with the execution and delivery of said note and to secure the payment of the sums due and to become due thereunder according to the terms and tenor thereof, the defendant, C. A. Butcher, who was then and there the owner of the personal property hereinafter described, made, executed and delivered to the plaintiff his certain indenture of mortgage conditioned upon the payment of said note wherein and whereby he mortgaged to the plaintiff the following described personal property situate in the County of Canyon, State of Idaho, to wit:

460 Tons of ensilage
39 Tons of grain
30 Tons of straw
40 Tons of hay

A copy of which chattel mortgage is hereto attached, marked Plaintiff's Exhibit A, and made a part of;

IV.

That said Chattel Mortgage was duly acknowledged by the maker thereof so as to entitle the same to be placed of record and also thereafter on October 20, 1955 filed his record in the office of the County Recorder of Canyon County, Idaho and appears of record therein as instrument No. 426919;

V.

That the said Chattel Mortgage contained a clause wherein it was provided that in the event the maker should fail to pay said promissory note at the time the same should become due the condition

of said Chattel Mortgage would become broken and the holder thereof should be entitled to have the same foreclosed; that the said promissory note is now past-due and unpaid and although demand has been made upon the defendants to pay the same the defendants have not paid the sums due on the said promissory note, or any part thereof, except the sum of Eight Hundred Seventy-nine ($879.00) Dollars, which was paid on April 6, 1956 and the sum of One Hundred Sixty-three ($163.00) Dollars, paid May 24, 1956, and by reason of the failure of said defendants to pay said note when the same became due the condition of said Chattel Mortgage has become broken and the plaintiff is entitled to have the same foreclosed;

VI.

That the plaintiff is now the owner and holder of said note and Chattel Mortgage and no proceedings have been had either at law or in equity for the collection thereof;

VII.

That there is now due, owing and unpaid from the defendants to the plaintiff under the terms and provisions of said Chattel Mortgage and the note thereby secured, the sum of Six Thousand Two Hundred Fifty-eight ($6,258.00) Dollars together with interest on the sum of Seven Thousand Three Hundred ($7,300.00) Dollars from October 17, 1955 until April 6, 1956, at the rate of six (6) per cent per annum and interest on the sum of Six Thousand Four Hundred Twenty-one ($6,421.00) from April 6, 1956 until May 24, 1956, at the rate of Six

(6) per cent per annum and interest on the sum of Six Thousand Two Hundred Fifty-eight ($6,258.00) from April 6, 1956 until date.

VIII.

That both the note above mentioned and the Chattel Mortgage, so executed by the defendant Butcher in favor of the plaintiff, contained a clause wherein it is provided that if suit or action be instituted to collect said note or foreclose said Chattel Mortgage a reasonable sum should be allowed the plaintiff as attorney's fees for such suit or action; that the sum of Six Hundred ($600.00) Dollars is a reasonable sum to be allowed the plaintiff as attorney's fees in this action if the foreclosure of said Chattel Mortgage and collection of said note, be not contested; that if the foreclosure thereof or the collection of said note should be contested the sum of One Thousand ($1,000.00) Dollars is a reasonable sum to be allowed the plaintiff as attorney's fees in this action and the plaintiff has become obligated to pay his attorneys a reasonable sum for their services herein rendered and to be rendered;

IX.

That the plaintiff does not know and cannot ascertain what portion of said mortgaged chattels is now in existence but is informed and verily believes and therefore alleges that practically all of said mortgaged personal property has been consumed by livestock feed by the defendant, Butcher, and is therefore no longer in existence and the plaintiff alleges that the defendant, Butcher, should

by order of this Court be required to disclose the amount and the whereabouts of any portion of said mortgaged personal property which is now in existence, and its location so that the value of said remaining personal property may be fixed and determined as a prerequisite to the entry of a deficiency judgment in this action;

Wherefore, the plaintiff prays judgment and decree of this Court as follows:

That the plaintiff have personal judgment against C. A. Butcher and Alberta G. Morrow, jointly and severally, for the sum of Six Thousand Two Hundred Fifty-eight ($6,258.00) Dollars together with interest at Six (6) per cent per annum upon the sum of Seven Thousand Three Hundred ($7,300.00) Dollars from October 17, 1955 until April 6, 1956 and together with interest on the sum of Six Thousand Four Hundred Twenty-one ($6,421.00) Dollars at the rate of Six (6) per cent per annum from April 6, 1956 until May 24, 1956 and for interest upon the sum of Six Thousand Two Hundred Fifty-eight ($6,258.00) Dollars from May 24, 1956 until date of judgment herein rendered; for the sum of Six Hundred ($600.00) Dollars as attorney's fees if the foreclosure of this action be uncontested and for the sum of One Thousand ($1,000.00) Dollars as attorney's fees if said action should be contested; that it be judged and decreed that the payment of all of said sums is secured by the chattel mortgage hereinbefore in this Complaint described;

That the defendants be required to come into

court and disclose the existence and whereabouts of any portion of said mortgaged personal property which is still in existence;

That the usual decree be made for the sale of said personal property by the United States Marshal for the district of Idaho or by some Master appointed by the Court for such purpose according to law and the practice of this Court and that the benefits of such sale be applied to the payment of the amounts due the plaintiff as aforesaid;

That the value of said mortgage chattels still existing be fixed and determined;

That the United States Marshal or special Master execute to the plaintiff a certificate of sale of said personal property and that if the amount received on sale of said personal property, after paying the cost of sale, be insufficient to pay the amount due the plaintiff that the said United States Marshal or special Master conducting said sale in his return on such sale specify the amount of such deficiency and that a deficiency judgment be entered in favor of the plaintiff and against the defendants jointly and severally, for the amount of such deficiency not exceeding however, the difference between the value of said mortgaged personal property still remaining in existence and the amount of the judgment, which may be entered herein together with costs and accruing costs; that if it should be disclosed by the evidence that no part of said mortgaged personal property is still in existence that in lieu of the entry of a decree of foreclosure and sale there

be entered a judgment in favor of the plaintiff and against the defendants, and each of them jointly and severally, for the amount found due upon said promissory note together with costs and attorney's fees to be fixed and determined in this action;

That the plaintiff have judgment for his costs and disbursements herein expended and for such other and further relief as to the Court may seem meet and equitable in the premises.

/s/ JAMES B. DONART,
/s/ GEO. DONART,
Attorneys for the Plaintiff.

EXHIBIT "A"

[Form No. 192—Chattel Mortgage—Long Form.]

This Indenture, made the 17th day of October, 1955, between C. A. Butcher of Route 2, Parma, County of Canyon, State of Idaho, and Alberta G. Morrow of Cottonwood, County of Idaho, State of Idaho, the parties of the first part, and James R. Yost of Nyssa, County of Malheur, State of Idaho, party of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of Seven Thousand Three Hundred and 00/100 ($7,300.00) Dollars, received by the parties of the first part, do grant, sell and convey unto the said party of the second part, certain goods and chattels now being in Lots 3 and 4 and Lots 1 and 8 of the Old Idaho Land Co., in Sec. 19, Twp. 6 N., Rge 5, W.B.M. in

Exhibit "A"—(Continued)

Canyon County, State of Idaho, and described as follows, to wit:

460 ton Ensilage;
39 ton Ear Corn;
30 ton Grain;
40 ton Straw;
90 ton Hay

To Have and To Hold the said goods and chattels unto the said party of the second part, his executors, administrators or assigns forever.

Provided, nevertheless, and these presents are on the express condition that if the said parties of the first part, their executors, administrators or assigns shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the sum of Seven Thousand Three Hundred and 00/100 ($7,300.00) Dollars, and interest thereon at the rate of 6 per cent, per annum in accordance with the terms of a certain promissory note, of which the following is substantially a copy:

October 17, 1955

$7,300.00

On or before April 15, 1956 after date, for value received, we promise to pay to the order of James R. Yost at The First National Bank of Portland at Nyssa, Oregon, Seven Thousand Three Hundred and 00/100 Dollars, in lawful money of the United States of America, with interest thereon in like lawful money at the rate of 6 per cent per annum,

Exhibit "A"—(Continued)

from date until paid. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

/s/ C. A. Butcher,
/s/ Alberta G. Morrow.

No.....
Form No. 216—Note.

and all such further sums as may hereafter be advanced to or for the account of the parties of the first part or expended by the party of the second part for taxes, insurance, operating care, maintenance, preservation, handling, marketing, transportation, or otherwise, in connection with the property herein described, then these presents shall be void.

And the said parties of the first part do hereby covenant that the property herein described is owned by C. A. Butcher and Alberta G. Morrow and is free from all incumbrances, except as above stated; not to sell, assign, transfer or deliver said property, or any part thereof, to any other person, nor to permit the same, or any part thereof, to be seized, levied upon or attached; not to remove or

Exhibit "A"—(Continued)

permit the removal by any person of the said property, or any part thereof, from the location described herein; to care for, preserve and protect the said property from all hazards to which it may be subject; to pay at maturity all taxes, liens or other incumbrances now subsisting, or hereafter to be laid or imposed upon said goods and chattels, and to keep the said property fully insured for a sum not less than $7,300.00 during all such time, in one or more good and responsible fire insurance companies, against all loss or damage by fire; the loss or damage, if any, to be made payable to the said party of the second part may, at his option, obtain such insurance and pay the premium therefor, and may pay all such taxes, liens and other incumbrances before or after the same shall have become liens upon said property, and likewise may, but shall not be obliged to make other and further loans, advances and expenditures to or for the account of the said parties of the first part, and all sums of money thus expended or advanced are hereby secured by these presents, and shall be repayable on demand from said parties of the first part to the said party of the second part, and the same shall bear interest from the date when made to the date of payment thereof at the rate of ten per cent per annum, unless at the time of the making of any expenditure or advancement the parties shall agree in writing for the payment of interest at some other rate.

If default be made in the payment of any sum, moneys or indebtedness now or hereafter secured

Exhibit "A"—(Continued)

hereby, or any part thereof, or the interest thereon, or if any of the covenants, conditions or agreements herein mentioned be not kept and performed, or if any representation herein made be false in any respect, or if any of the said property be sold, assigned, delivered, seized, attached, or levied upon, or abandoned, or if said property shall so decrease in value as to impair the security afforded hereby, or if the parties of the first part (or either of them, if there be more than one) shall be or become bankrupt or insolvent or a receiver shall be appointed in any proceeding with authority to take, hold or manage any of the property of such party, then, in any of said events, the party of the second part may elect and shall have the right and power, personally or by agent, to enter upon any place where the property herein described, or any part thereof, may be and take possession thereof and remove the same, with or without legal process, and, in addition thereto, the whole of the indebtedness hereby secured shall, at the option of the party of the second part, thereupon become due and payable without notice, although the time expressed for the payment thereof shall not have arrived. Party of the second part may, at any time thereafter, and from time to time, sell and dispose of the property hereby mortgaged, or any part thereof, at public auction, upon giving notice thereof in one publication of any newspaper published in said County and State not less than one week prior to the time set therefor, or upon giving such notice as is required by law for

Exhibit "A"—(Continued)

the sale of personal property upon execution, or at private sale, with or without notice; and out of the moneys arising therefrom to retain and pay all costs and expenses which may have been incurred in possessing, searching for, taking, keeping, caring for, handling, transporting and selling said property, or any part thereof, and all the obligations, of every kind and nature, secured by this mortgage, including a reasonable sum as attorney fees, whether such foreclosure is completed or not, rendering the overplus unto the parties of the first part. In any or all of the events aforesaid, the party of the second part may elect to foreclose this mortgage in an original suit to be brought therefor, in which event a receiver may be appointed to take possession of the property herein described during the pendency of the foreclosure proceeding; and in any such suit, the parties of the first part shall pay such sum as may be adjudged reasonable for plaintiff's attorney fees and the same shall constitute a lien upon the property herein described; but until such time as possession is taken by the party of the second part, or by a receiver under the terms and conditions hereof, the parties of the first part shall continue in possession of said property.

All remedies herein specified shall be considered as optional and cumulative and not as a waiver of any other right or remedy which would otherwise exist at law or in equity for the enforcement of this mortgage, or the collection of the indebtedness secured hereby.

Exhibit "A"—(Continued)

Executed in the presence of

.....,
.....,
.....,
.....,

[Seal] C. C. Butcher,
[Seal] Alberta G. Morrow.

State of Oregon,
County of Malheur—ss.

We, C. A. Butcher and Alberta G. Morrow, being first duly sworn, say that we are the sole and exclusive owners of the property described in this mortgage and in the lawful possession thereof; that the same is paid in full, and that there are no incumbrances or liens of any kind whatsoever existing at this date against said property.

C. A. Butcher,
Alberta G. Morrow.

Subscribed and sworn to before me this 18th day of October, 1955.

Harold Henigson,
Notary Public for Oregon. My Commission expires 9/3/59.

State of Oregon,
County of Malheur—ss.

Be It Remembered, That on this 18th day of October, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally

Exhibit "A"—(Continued)

appeared the within named C. A. Butcher and Alberta G. Morrow, known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

Harold Henigson,
Notary Public for Oregon. My Commission expires 9/3/59.

Endorsements: No..... Chattel Mortgage (Form No. 192). C. A. Butcher et al., to James R. Yost.

State of Idaho,
County of Canyon—ss.

I certify that the within instrument was received for record at request of Harold Henigson on the 20th day of October, 1955, at 9:10 o'clock a.m., and recorded in book on page Record of Mortgages of said County, or filed under number

Witness my hand and seal of County affixed.

S. S. Foote,
County Clerk-Recorder,
Lavona Sayre,
Deputy.

Fee $.75
73-67

[Endorsed]: Filed July 25, 1956.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Come now the defendants and answer plaintiff's complaint as follows:

I.

Admit the allegations contained in Paragraphs I, II, III and IV.

II.

Deny the allegations contained in Paragraphs V, VI, VII, VIII and IX except that defendants admit that plaintiff is now in possession of a note and mortgage executed by defendants.

By way of an Affirmative Defense and Counterclaim against plaintiff the defendants allege:

I.

That on or about the 15th day of July, 1955, the plaintiff, James R. Yost, through the use of fraud and misrepresentation induced the defendant, C. A. Butcher, to enter into a contract with the plaintiff. That said fraud consisted of the plaintiff's misrepresentation that the plaintiff was the owner of four hundred (400) head of weaner and yearling cattle. That in truth and fact plaintiff was not the owner of four hundred (400) head of such cattle, but in truth and fact owned only approximately ninety-six (96) head of such cattle. That a copy of such contract is hereto attached, marked Defendant's Exhibit A, and by this reference made a part hereof.

II.

That on or about the 28th day of November, 1955, plaintiff Yost delivered to defendant, C. A. Butcher's ranch in Canyon County, Idaho, approximately three hundred ninety-six (396) head of aforesaid weaner and yearling cattle. That at the time of such delivery plaintiff Yost represented that he was the owner of said three hundred ninety-six (396) head of cattle. That in truth and fact plaintiff was not the owner of said three hundred ninety-six (396) head of cattle, but only owned approximately ninety-six (96) head of such cattle. Defendants are informed and believe and therefore state on the basis of such information and belief that one John Stringer was the owner of approximately three hundred (300) head of such cattle.

III.

That aforesaid contract provided that defendant, C. A. Butcher, should feed and care for said cattle for a period of not less than one hundred fifty (150) days.

IV.

That defendant, C. A. Butcher, cared for and fed said three hundred ninety-six (396) cattle on his ranch in Canyon County, Idaho, from November 28, 1955, until April 6, 1956.

V.

That on or about April 6, 1956, and in violation of the terms of said contract plaintiff Yost and one

John Stringer removed said cattle from defendant, C. A. Butcher's ranch. That such removal of said cattle constituted a breach of the said contract and prevented the defendant, C. A. Butcher, from feeding and caring for said cattle.

VI.

That defendant, C. A. Butcher, during the period of time between November 28, 1955, and April 6, 1956, expended and used feed, labor, equipment and property in feeding and caring for said cattle in the total value of Fourteen Thousand One Hundred Thirty-eight and 40/100 ($14,138.40) Dollars.

VII.

That the note and mortgage referred to in plaintiff's complaint were made in connection with the aforesaid contract. That the moneys paid to defendants upon execution of said note and mortgage were used by defendants to purchase feed for the feeding of the cattle referred to in the contract. That plaintiff well knew for what purpose the moneys acquired on execution of said note would be used. That the said chattel mortgage referred to in plaintiff's complaint was upon feed which defendant, C. A. Butcher, intended to feed to said three hundred ninety-six (396) head of cattle. That the plaintiff well knew that defendant, Butcher, intended to and actually did feed the property covered by the chattel mortgage to said three hundred ninety-six (396) head of cattle which plaintiff Yost

had fraudulently misrepresented as belonging to plaintiff Yost.

VIII.

That defendants would not have entered into said contract, or executed said note or mortgage had they known that plaintiff was not the owner of the three hundred ninety-six (396) head of cattle. That defendants in the execution of the contract and the note and mortgage relied on plaintiff's representations that plaintiff owned said cattle and were not aware of the fraud and misrepresentation which had been practiced by plaintiff until on or about April 16, 1956.

IX.

That the defendants have made demand upon plaintiff for the value of the services rendered in the feeding and caring for aforesaid cattle. That defendants' said demand was in the amount of Fourteen Thousand One Hundred Thirty-eight and 40/100 Dollars ($14,138.40) less Seven Thousand Three Hundred Dollars ($7,300.00), or a net demand of Six Thousand Eight Hundred Thirty-eight and 40/100 Dollars ($6,838.40). That plaintiff refused to comply with said demand. That there is now due and owing by plaintiff to defendant, C. A. Butcher, the sum of Six Thousand Eight Hundred Thirty-eight and 40/100 Dollars ($6,838.40), together with interest thereon at the rate of six per cent (6%) per annum from the date of April 6, 1956.

Wherefore, defendants pray judgment and decree of this court as follows:

That the note and mortgage referred to and set forth in plaintiff's complaint be cancelled.

That the contract between plaintiff and defendant, C. A. Butcher, be decreed as rescinded.

That the court decree defendants have restitution of the value of services and property expended and used in the performance of the contract terms, less the face amount of the note.

That defendant, C. A. Butcher, have judgment against the plaintiff in the amount of Six Thousand Eight Hundred Thirty-eight and 40/100 Dollars ($6,838.40) plus interest at six per cent (6%) per annum upon said sum from April 6, 1956, until date of judgment herein rendered.

That the plaintiff be required to disclose the whereabouts of the three hundred ninety-six (396) head of cattle.

That the defendants have judgment for their costs and disbursements expended herein and for such other and further relief as to the court may seem meet and equitable in the premises.

/s/ ALLAN G. SHEPARD,
Attorney for Defendants.

EXHIBIT "A"

AGREEMENT

This Agreement, made and entered into this 15th day of July, 1955 by and between James R. Yost, residing at Nyssa, Oregon, hereinafter referred to as the First Party, and C. A. Butcher, residing at Route 2, Parma, Idaho, hereinafter referred to as the Second Party, Witnesseth:

Whereas, the Second Party desires to feed certain cattle owned by the First Party for the purpose of fattening the same; and

Whereas, the First Party desires to have the Second Party feed said cattle upon the terms and conditions hereinafter set forth.

Now, Therefore, In Consideration of the Premises and the Mutual Covenants and Agreements Herein Contained, the Parties Hereto Contract and Agree as Follows:

1. That on or about the 15th day of November, 1955, the First Party shall deliver approximately four hundred (400) weaner and yearling cattle at the farm of the Second Party situated in the County of Canyon, State of Idaho, and more particularly described as Lots 3 and 4 and Lots 1 and 8 of the old Idaho Land Company, all in Section 19, Township 6 North, Range 5, W.B.M., where said cattle shall be fed and cared for by the Second Party.

2. That the Second Party shall care for and full feed said cattle at his own expense from the date

Exhibit "A"—(Continued)

of their delivery for a period of not less than one hundred and fifty (150) days, or until returned to the First Party, it being understood and agreed that the Second Party will take care of and full feed said cattle and return them to the First Party in such numbers and at such dates as the First Party shall determine they are ready for sale or other disposition.

3. As full and complete compensation for furnishing feed and caring for and full feeding said cattle, and furnishing all facilities therefore, the First Party agrees to pay to the Second Party fifteen (15) cents per pound for entire gain per animal provided said cattle are fed a minimum of 150 days, it being understood that the gain in weight to be paid for will be the difference between the total inbound and outbound weights of said cattle less losses sustained during said feeding period, as hereinafter provided.

4. The Second Party agrees to receive said cattle on the same day the First Party receives them from his seller, and the Second Party agrees to accept the weights paid for by the First Party, which such weights shall be the inbound weights.

5. Any and all losses of said cattle, for any cause whatsoever shall be borne equally by the parties hereto. The amount of such losses shall be determined by taking the average price of each animal at the time of purchase by the First Party, which average price shall be the basis for cost of

Exhibit "A"—(Continued)

each animal lost. The share of the Second Party's losses shall first be deducted from the value of the gain for which the Second Party shall be entitled to payment. In the event the gain shall be insufficient for such purpose the Second Party shall reimburse the First Party forthwith in the amount of all undeducted losses.

6. Upon completion of the feeding period or any sooner termination thereof the Second Party shall return said cattle to the First Party upon demand, and the latter shall thereupon have the same weighed out upon scales at Nyssa, Oregon, with a three (3%) per cent shrinkage, which latter weights shall be accepted by the Second Party as the outbound weight to be used in determining the gain for which the Second Party shall be entitled to payment.

7. The Second Party shall, at his own expense, furnish all necessary pasturage, feed (including ensilage, hay and grain) and all other usual facilities for the proper feeding and care of said cattle. The Second Party covenants and agrees to develop the feeding program until the daily ration shall be fifteen (15) pounds of ensilage, two (2) to three (3) pounds of grain and approximately five (5) pounds of hay or its equivalent for each animal.

8. The First Party shall pay to the Second Party upon execution of this agreement the sum of Eight Hundred and 00/100 ($800.00) Dollars, receipt whereof is hereby acknowledged, said sum to rep-

Exhibit "A"—(Continued)

resent an advance against any net gain payments to be made by the First Party and to be deducted from the first gain payments payable to the Second Party. The Second Party shall be entitled to payment of his net share of the gain promptly upon receipt by the First Party of the proceeds of the sale of said cattle subject of the within feeding program.

In the event the Second Party shall fail, refuse or neglect to fulfill the terms of this agreement or no net gain shall be realized on said feeding program, the Second Party shall forthwith repay to the *Second* Party said advance payment or such part thereof as may be unearned.

9. The First Party shall have the right to inspect said cattle at any and all times to see that they are given proper feed, care, and protection, and in the event that, in his opinion or the opinion of his proper representative, they are not being given such feed, care, and protection, said First Party shall have the right to withdraw said cattle on demand, and in that event shall pay the Second Party according to the above schedule of gain price, only for the weight, if any, added to said cattle to the time of the withdrawal, less the Second Party's share of losses and the cash advance as heretofore provided.

10. It is understood and agreed that the First Party retains title to said cattle at all times. It is further understood and agreed that the Second

Exhibit "A"—(Continued)

Party has no interest or ownership in said cattle or any part of them, nor shall said Second Party have any lien or claim of any character upon said cattle and the Second Party agrees to keep said cattle free of liens and claims of third persons and to indemnify and save harmless the First Party therefrom and to reimburse the First Party for all costs and attorney's fees incurred by him in defending against any of such liens or claims.

11. It is understood and agreed by and between the parties hereto that neither the Second Party nor any of his employees shall be deemed or construed to be an employee or entitled to the benefits of employment by the First Party, and it is further understood and agreed that anything herein to the contrary notwithstanding, the Second Party expressly disclaims possession by it of any rights with respect to the First Party, except the rights of an independent contractor.

12. That the terms and conditions of this agreement shall bind and benefit respectively the parties hereto and their respective heirs, executors, administrators and assigns.

In Witness Whereof, the parties have hereunto set their hands and seals as of the day and year first above written.

[Seal] /s/ JAMES R. YOST,
(First Party),

[Seal] /s/ C. A. BUTCHER,
(Second Party).

Exhibit "A"—(Continued)

State of Oregon,
County of Malheur—ss.

Be It Remembered, That on this 15th day of July, A.D., 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named James R. Yost and C. A. Butcher, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and seal as of the day and year last above written.

/s/ HAROLD HENIGSON,
Notary Public for Oregon. My Commission Expires 9/3/55.

[Endorsed]: Filed August 30, 1956.

[Title of District Court and Cause.]

ANSWER TO COUNTER-CLAIM AND CROSS-COMPLAINT

Comes Now the plaintiff, James R. Yost, and answer the counter-claim and cross-complaint of the defendant as follows:

I.

Answering paragraph I of said counter-claim and cross-complaint, the plaintiff admits that a

contract was entered into between the plaintiff and the defendant, Butcher, on or about July 15th, 1955 and that a true copy of said contract or agreement is attached to said cross-complaint, but denies each and every other allegation in said paragraph contained;

II.

Answering paragraph II of said counter-claim and cross-complaint, the plaintiff admits the allegations therein contained down to and including the word cattle in line Four (4) of said paragraph and denies each and every other allegations in said paragraph contained, except in so far as said allegations may be admitted or qualified by affirmative allegation herein and in this connection alleges the facts to be that the plaintiff did not at any time represent to the defendant that he was the owner of 396 head of cattle; that the defendant, Butcher, at all times knew that approximately 300 head of said cattle were the property of the said John Stringer;

III.

Answering paragraph III of said counter-claim and cross-complaint, the plaintiff denies that the contract provided that the cattle should be fed for a period of not less than 150 days and in this respect alleges the facts to be that paragraph II of said contract, a copy of which is attached to said counter-claim, provides that said cattle shall be fed for a period of not less than 150 days or until returned to the first party, (plaintiff), it being understood and agreed that the second party, (defend-

ant), will take care of and full feed said cattle and return them to the first party, (plaintiff), in such numbers and at such dates as the first party (plaintiff), shall determine they are ready for sale or other disposition; that paragraph VI of said contract contains the following language: "Upon completion of the feeding period or any sooner termination thereof the Second Party shall return said cattle to the First Party upon demand,"; that paragraph IX of said contract contains the following language: "The First Party shall have the right to inspect said cattle at any and all times to see that they are given proper feed, care, and protection, and in the event that, in his opinion or the opinion of his proper representative, they are not being given such feed, care, and protection, said First Party shall have the right to withdraw said cattle on demand, and in that event shall pay the Second Party according to the above schedule of gain price, only for the weight, if any, added to said cattle to the time of the withdrawal, less the Second Party's share of losses and the cash advance as heretofore provided."

IV.

Answering paragraph IV of said counter-claim and cross-complaint the plaintiff admits the allegations therein contained;

V.

Answering paragraph V of said counter-claim and cross-complaint, the plaintiff denies each and

every allegation therein contained and in this connection alleges the facts to be that on April 6th, 1956 the plaintiff inspected said cattle and found that they were not being given proper feed, care and attention and also ascertained that the defendant had fed practically all of his feed and had neither feed nor money with which to purchase feed to enable him longer to feed said cattle and on said date it was mutually agreed between the plaintiff and the defendant and the said John Stringer, that said cattle should be turned back to the plaintiff and said cattle on said date were voluntarily returned to the plaintiff;

VI.

Answering paragraph VI of said counter-claim and cross-complaint, the plaintiff alleges that he has no knowledge, information, or belief upon the subject sufficient to enable him to answer the allegations therein contained, and placing his denial upon that ground denies each and every allegation in said paragraph contained;

VII.

Answering paragraph VII of said counter-claim and cross-complaint, the plaintiff admits the allegation therein contained down to and including the word cattle in line Ten (10) thereof; further answering said paragraph the plaintiff denies each and every other allegation therein contained with the following qualifications: The plaintiff knew that it was the intention of the defendant to feed

said hay to said cattle but does not know whether all of said hay was so fed or whether a portion thereof remains undisposed of and as security of the payment of said mortgage;

VIII.

Answering paragraph VIII of said counter-claim and cross-complaint, the plaintiff denies each and every allegation in said paragraph contained;

IX.

Answering paragraph IX of said counter-claim and cross-complaint, the plaintiff admits that the defendants made a demand upon the plaintiff for the payment of the sum of Six Thousand Eight Hundred Thirty-eight and 40/100 ($6,838.40) Dollars and that the plaintiff has not paid the same or any part thereof to the defendants pursuant to said demand but denies each and every other allegation in said paragraph contained; further answering said paragraph IX the plaintiff alleges that on or about April 6th, 1956 or shortly thereafter the plaintiff and the defendant, Butcher, agreed upon the amount of money due the defendant, Butcher, under the terms of said written contract and the amount thereof was credited upon the note sued upon in this action, and the amount sued for in this action is the amount due the plaintiff from the defendant after crediting the defendant for the full amount due him for feeding and caring for said cattle.

Wherefore, plaintiff prays that the defendant

take nothing by said counter-claim and cross-complaint and that the plaintiff have judgment as prayed for in his original complaint.

DONART & DONART,
/s/ GEO. DONART,
/s/ JAMES B. DONART,
Attorneys for the Plaintiff.

[Endorsed]: Filed September 7, 1956.

In The District Court of the United States
District of Idaho, Southern Division

No. 3270

JAMES R. YOST, Plaintiff,

vs.

C. A. BUTCHER, and ALBERTA G. MORROW, Defendants.

JUDGMENT

The above entitled action came on regularly for trial at Boise, Idaho, the 23rd day of October, 1957, Geo. Donart of the firm of Donart & Donart of Weiser, Idaho, appearing as attorney for the plaintiff and Allan G. Shepard and William R. Padgett both of Boise, Idaho, appearing as attorneys for the defendants;

Witnesses were sworn and examined and documentary evidence introduced. At the close of the plaintiff's case counsel for the defendant moved for a Judgment of Nonsuit and Dismissal in favor of the defendant Alberta G. Morrow, which Motion

was taken under advisement by the Court and at the close of the defendant's case was again renewed by defense counsel and said Motion was granted and the cause ordered dismissed insofar as it affected the said Alberta G. Morrow. After both sides had rested their respective cases the cause was submitted to the Court for consideration and determination.

The Court being fully advised as to the law and the premises makes and enters its Findings of Fact and Conclusions of Law and orders that Judgment be entered accordingly.

Now, Therefore, By virtue of the law and the premises and the Findings of Fact and Conclusions of Law, as aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

That the above entitled action insofar as it affects the defendant Alberta G. Morrow be, and the same is hereby dismissed;

That the plaintiff be, and he is hereby awarded judgment against the defendant C. A. Butcher in the sum of Six Thousand Two Hundred Fifty-eight ($6,258.00) Dollars, together with interest thereon at the rate of six per cent per annum from April 6, 1956; for the sum of Seven Hundred Fifty ($750.00) Dollars, attorneys fees and for plaintiff's costs and disbursements herein expended and taxed at $.....

Dated This 21st day of March, 1958.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

[Endorsed]: Filed March 24, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above Named Defendants, C. A. Butcher and Alberta G. Morrow and to Allan G. Shepard and William R. Padgett, Their Attorneys of Record:

Notice Is Hereby Given That James R. Yost, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of that certain Judgment entered in this action on the 24th day of March, 1958, wherein and whereby it was adjudged and decreed:

> "that the above entitled action insofar as it affects the defendant Alberta G. Morrow be and the same is hereby dismissed."

This appeal is taken upon all questions of both law and fact.

Dated this 26th day of March, 1958.

/s/ GEO. DONART,
/s/ JAMES B. DONART,
Attorneys for the Plaintiff-Appellant.

[Endorsed]: Filed March 29, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Answer and cross-complaint.
3. Answer to counter-claim and cross-complaint.
4. Judgment.
5. Exhibits 1 to 14 inclusive.
6. Notice of appeal of James R. Yost.
7. Designation of James R. Yost of contents of record on appeal.
8. Copy of docket entries.
9. Notice of appeal of C. A. Butcher.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 23rd day of April, 1958.

[Seal] ED. M. BRYAN,
Clerk,
s/ By LONA MANSER,
Deputy.

In The District Court of the United States,
District of Idaho, Southern Division

No. 3278

JAMES R. YOST, Plaintiff,

v.

C. A. BUTCHER and ALBERTA G. MORROW,
Defendants.

REPORTER'S TRANSCRIPT

Before: Hon. Edward P. Murphy, Judge.

Appearances: For Plaintiff: Messrs. Donart & Donart, by George Donart, Esquire. For Defendants: William R. Padgett, Esquire, and Allan G. Shepard, Esquire. [1]*

Wednesday, October 23, 1957—10:00 O'Clock A.M.

The Clerk: James R. Yost versus C. A. Butcher and Alberta G. Morrow, for court trial.

The Court: You may proceed. I am familiar with the pleadings.

Mr. Donart: Plaintiff is ready. At this time, if the Court please, and I was just discussing with defense counsel, the fact that if we can have probably a 10 or 15 minute pre-trial interview we could probably shorten the testimony several times.

The Court: All right. Satisfactory?

Mr. Shepard: Satisfactory.

One further item, before we get to that, your

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Honor, may the record show the association of Mr. William R. Padgett as additional counsel for the defense in this matter.

The Court: It will be so ordered.

(PRE-TRIAL)

Mr. Donart: I believe your Answer admits execution of the note and mortgage. Am I correct in that?

Mr. Shepard: You are correct, sir.

Mr. Donart: Now, we allege in this case that the mortgaged property has all passed out of existence. It was mortgaged feed, that it has probably all been consumed by the defendants' livestock or otherwise. In other words, the [3] proof of whether or not any of the mortgaged property is still in existence, could we stipulate on that, whether it is or isn't? That is a matter within the defendants' knowledge, not within ours.

Mr. Shepard: If the Court please, the only stipulation that the defendants will be willing to make to that effect is that the feed that was the subject of mortgage was fed to the plaintiff's livestock.

Mr. Donart: We don't care whom it was fed to. We just want to know if any of it is still in existence so that the judgment in this case will be one of foreclosure or whether it would be a judgment on the note.

If the Court please, I was going to say, we have a peculiar decision in the State of Idaho that if any part of mortgaged property is still in existence, even though it is completely worthless, that we still

have to foreclose the mortgage. And that's the purpose, your Honor.

The Court: You are willing to agree, are you not, Mr. Shepard, that the feed is no longer in existence?

Mr. Shepard: By far the substantial part. The only feed which would be in existence would be some ensilage which I believe is still on the ranch and which has become valueless through rot. The remainder of the feed was fed to the cattle.

The Court: Well, if Mr. Donart's statement to me [4] of Idaho is correct, it is still subject to a mortgage.

Mr. Donart: It may not have any value, but as I interpret the case of York versus Roberts, that if it still exists—In that case it was proven that the mortgaged property had no value, the Court ruled that the mortgage should have been foreclosed.

If there is some ensilage down there, and if you think there is some down there, we would just as soon send the Marshal down there and pile it up, notice it for sale, and have someone bid for thirty cents or whatever they would pay for it. Ensilage of that age wouldn't have value.

Mr. Shepard: No. I believe I stated, Mr. Donart, that the ensilage was of no value.

Mr. Donart: Well, that has nothing to do with it; if the ensilage is in existence——

Mr. Shepard: If your Honor please, I don't know how I can simplify the matter any further. I have disclosed what we know of the extent of it.

It would seem to me to be a sort of ridiculous thing to do, to take something that ostensibly has no value whatsoever and go through the tortuous procedure of having it bid in for thirty cents and the Marshal going down there and go through all the process that will be necessary.

Can't we stipulate that it is of no value, Mr. Donart? [5]

Mr. Donart: Well, couldn't we do it this way, couldn't we stipulate that it is unnecessary to foreclose the mortgage?

Mr. Shepard: If your Honor please, the pleadings in this case as the Court is well aware, taking the Complaint, was shaped up on the theory of note and mortgage. And now for the first time I am being asked to stipulate that we need have nothing to do with the mortgage here at all. I don't quite see how I can take that position. There is too much evidence here in relation to this so-called security, as to whether it has been exhausted, as to whether the debt has been satisfied in that matter or not. I don't see how I can stipulate we don't need to consider the mortgage at all. I mean, that's hardly the shape of the pleadings that we have prepared in this case.

I don't mean to be stuffy about it, and I am perfectly willing to stipulate to this effect, that if plaintiff does agree—does secure judgment and decree in this case, that the defendants are willing to agree that the remaining ensilage which is left is valueless and if foreclosed upon would result in merely a useless disbursement of funds.

The Court: May I suggest this, let's reserve that situation until the conclusion of the trial.

Mr. Donart: That is agreeable with us, your Honor.

Mr. Shepard: I will agree with that, your Honor. [6]

Mr. Donart: Now, there is a question of attorney's fees. In the event plaintiff prevails, we probably would have to call an attorney here from downtown. Would you be willing to stipulate that if the plaintiff prevails the Court may fix the amount of attorney's fees without the necessity of any proof as to whether it is or is not a reasonable fee? The Court will know how much work has been involved, the Court will be much better able to fix the fee than the attorney that was called up here as a witness.

Mr. Shepard: The defendant will so stipulate to that, your Honor, that the Court may fix the fee and that fees are secured.

We are ready to proceed.

Mr. Donart: Does the Court care for any opening statement?

The Court: No. [7]

Mr. Donart: Call Mr. Yost.

JAMES R. YOST

called as a witness in his own behalf, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name and occupation for the record.

A. James Robert Yost.

Direct Examination

Q. (By Mr. Donart): Where do you live, Mr. Yost? A. I live at Nyssa, Oregon.

Q. Are you the plaintiff in this action?

A. I am.

Q. Are you acquainted with the defendants C. A. Butcher and Alberta G. Morrow?

A. I am.

(Whereupon, note marked for identification as Plaintiff's Exhibit No. 1; mortgage marked for identification as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Donart): The Bailiff is handing you two instruments marked Exhibit 1 and Exhibit 2. Will you look at No. 1 and tell us whether that is the note referred to in your complaint?

A. Yes, it is.

Q. Speak loudly enough so the Court can hear you. [8] A. Yes, it is.

Q. And look at Exhibit 2 and just roughly state whether that is a certfiied copy of your mortgage. A. Yes, it is.

Mr. Donart: We offer in evidence Exhibits 1 and 2.

The Court: Let them be received in evidence.

(Testimony of James R. Yost.)

The Clerk: Plaintiff's Exhibits 1 and 2 in evidence.

(Whereupon, Plaintiff's Exhibits 1 and 2 for identification were received in evidence.)

[Note: Plaintiff's Exhibit No. 1—Note, is the same as set out in Exhibit A at pages 11-12. Exhibit 2—Mortgage is the same as Exhibit A set out at pages 10-17.]

(Whereupon, checks marked for identification, respectively, Plaintiff's Exhibits 3 and 4.)

Q. (By Mr. Donart): You are now handed two checks marked for identification Exhibits 3 and 4. Were those checks issued by you?

A. Yes, they were.

Q. And are they the two checks that make up the principal sum stated in your note $7300?

A. Yes, sir.

Mr. Donart: We offer in evidence Exhibits 3 and 4.

The Court: They will be received.

Mr. Shepard: If your Honor please, I would like to object to that. I haven't had an opportunity to see these checks. [9]

The Court: All right, the ruling is withdrawn pending your examination of the instrument.

(Counsel examining.)

Mr. Shepard: I will object to the admission of said checks on the grounds that the witness has stated that they represent payment of the principal

(Testimony of James R. Yost.)

sum of $7300. Said checks reveal on their face they are made out to C. A. Butcher and the said checks were endorsed by C. A. Butcher, alone, without the defendant Morrow appearing thereon.

The Court: Well, I think that can be developed. I think Mr. Donart will develop what the defendant Butcher received out of it. You intend to do that, do you not?

Mr. Donart: Yes, we do.

The Court: I mean the defendant Morrow, what the defendant Morrow received out of it.

Mr. Donart: Could I see the checks?

Q. Now, these checks are made out only to the defendant Butcher. Could you explain why they were made out to Butcher instead of Butcher and Morrow?

A. I made the checks to Butcher for the feed that he was to furnish. That is, this is—the $6500 was a loan that I took in advance of this contract from Mr. Butcher. Therefore, I made the check to him. The $800 was a payment on the contract. Mrs. Morrow was asked to sign the notes to secure the mortgage. [10]

Q. Did she sign the note?

A. Yes, sir, she did.

Q. And, I believe, the mortgage, is that correct?

Mr. Shepard: I am going to object to that, unless some special foundation is laid to show this defendant knows and was present at the time she signed the mortgage or signed the note.

The Court: Do you know if she——

(Testimony of James R. Yost.)

Mr. Donart: You admit by your pleadings the execution of the note by those two defendants.

The Court: Is that true?

Mr. Shepard: We have admitted so. But I object to this witness stating something unless the foundation is laid.

The Court: Let's find out about it. Were you present when the note was signed?

A. No, sir. The note was signed in front of Mr. Hal Henigson, the attorney at Nyssa, in his office.

The Court: Is he your attorney?

A. Yes, sir, he was at that time.

The Court: You were not present?

A. I was not present, no, sir.

The Court: The objection will be overruled.

Q. (By Mr. Donart): Now you allege in your complaint that your credit on the note on April the 6th was the sum of [11] $879?

A. That is correct.

Q. And what was that credit for?

A. That was a credit for the gain that Mr. Butcher had earned on his contract with me.

Q. On a contract with you?

A. That's right.

Q. And another item of $163?

A. That was for some pasture that I had made arrangements with Mr. Butcher to leave the cattle on until I could find other grass.

Mr. Shepard: May I have that ruling clarified

(Testimony of James R. Yost.)

as to whether the checks have been admitted at this time? Otherwise, I wish to make an objection.

The Court: Make your objection.

Mr. Shepard: I believe that the witness has stated that these checks represent the principal sum payable under that note. I believe the face of one of the checks will indicate that sum of $800 which, if I am correct, was drawn far in advance of the date of execution of the note. I would like to have the checks for just a moment to refresh my memory. If such is not the case I wish to withdraw the objection.

(Counsel examining.)

Mr. Shepard: We make the objection on that ground.

The Court: The objection is overruled. Let them [12] be received in evidence.

(Whereupon, Plaintiff's Exhibits No. 3 & 4 for identification were received in evidence.)

PLAINTIFF'S EXHIBIT No. 3

Contract on 400 head of cattle in feed lot.

No.

Nyssa Branch

THE FIRST NATIONAL BANK

of Portland 96-342

1232

(Testimony of James R. Yost.)

Nyssa, Oregon, July 15, 1955.

Pay to the Order of C. A. Butcher $800.00/100
Eight hundred and no/100 Dollars
/s/ James R. Yost

[Reverse side]

Endorsed: C. A. Butcher. Cancelled: Paid 7/16/55

PLAINTIFF'S EXHIBIT No. 4

Nyssa Branch No. ...
THE FIRST NATIONAL BANK
of Portland 96-342

1232

Nyssa, Oregon, Oct. 19, 1955

Pay to the Order of C. A. Butcher $6,500.00/100
Six Thousand Five hundred and no/100 ..Dollars
for herd /s/ James R. Yost

[Reverse side]

Endorsed: C. A. Butcher. Cancelled: Paid 10/20/55

(Whereupon, a group of letters were marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Donart): Will you look at a sheaf of papers, a couple of letters or copies of the letters. (Handing to witness). Do those letters explain the manner in which you arrived at your credit of $163 on May 24th?

Mr. Shepard: I am going to object, if your

(Testimony of James R. Yost.)

Honor please. The letters seem to be written by Mr. Padgett, here, to Mr. Donart. I don't know how this witness can testify to the import of those letters, what they explain.

Mr. Donart: Well, that is all they are going to be offered for, showing how he arrived at the figure of $163, not to prove that is the correct figure.

The Court: To that limited extent, the objection is overruled and the witness may testify.

Q. (By Mr. Donart): Do those letters explain how you arrived at the $163 figure?

A. Yes, sir, they do.

Mr. Donart: For that purpose we offer them in evidence.

The Court: They will be received for that purpose.

Mr. Shepard: May the record show our objection? [13]

The Court: It already shows.

(Whereupon, Plaintiff's Exhibit 5 for identification was received in evidence.)

Q. (By Mr. Donart): Have you ever received any further payments on that note?

A. No, sir, none.

Mr. Donart: Does the Court desire that we figure and make proof of the amount of accrued interest and principal or is that a matter than can be taken care as the case is decided?

The Court: I will take that up then.

Mr. Donart: You may cross-examine.

(Testimony of James R. Yost.)

Cross Examination

Q. (By Mr. Shepard): Mr. Yost, this one check which was drawn for $800, what date was that issued on, if you remember?

A. I would like to see the check. (Examining.) It was written on the day that it states on the check, July 15 of '55.

Q. And that was long in advance of the execution of this note on October 17, was it not?

A. This was in advance of the note and mortgage, yes, sir.

Q. That was in advance, not an advance—it was in advance of the date of the note and mortgage? A. This was an advance.

Q. It was an advance? [14]

A. It was an advance on his contract, yes, sir.

Q. It was an advance on the contract?

A. Yes, sir, that's right.

Q. What contract was that?

A. I think you have a copy there of the contract that existed between Mr. Butcher and I.

Q. In other words, that $800 was something which you paid him pursuant to the contract, is that correct? A. I don't quite get you.

Mr. Donart: Just a minute. That is objected to upon the ground the contract itself would be the best evidence of that.

The Court: I will overrule the objection.

A. I don't quite understand your question.

Q. (By Mr. Shepard): Did the contract which you entered into with Mr. Butcher require you to

(Testimony of James R. Yost.)

make up that payment of $800? A. No, sir.

Q. It did not? A. No, sir.

(Whereupon, contract was marked Defendants' Exhibit No. 6 for identification.)

Q. (By Mr. Shepard): The Bailiff is handing you that which has been marked for identification 6, is that the contract you entered into with Mr. Butcher? [15] A. Yes, sir.

Q. Does your signature appear on the back page thereof? A. Yes, sir.

Q. Does Mr. Butcher's signature appear on the back page? A. Yes, sir.

Q. Your lawyer prepared that contract?

A. Yes, sir.

Q. Will you refer to Paragraph 8 of said contract, on Page 3, and state what that provides as far as a payment of $800 is concerned?

A. (Reading).

Q. This check of $800 then was paid pursuant to that contract, was it not?

A. It was paid at the time of the contract.

Q. It was paid at the time of the contract?

A. Yes, sir.

Q. This contract was executed on what date, Mr. Yost? A. July 15 of '55.

Q. And on what date was that $800 check issued? A. July 15 of '55.

Q. And the contract calls for the payment of $800 on the day of issuance of that—on the date of execution of that contract, is that correct?

(Testimony of James R. Yost.)

A. It says here that the "First Party shall pay" —Yes, that's right. [16]

Q. And who is the First Party named in that contract? A. Myself.

Q. Yourself. So this particular check, which is Exhibit No. 4, was the check that you paid pursuant to that contract, is that right?

A. Yes, it was paid at the time of the contract, that's right.

Q. Was it paid pursuant to the contract, Mr. Yost?

A. Wait a minute, what do you mean by "pursuant"?

Q. Under the terms of the contract. Is that the check that you were required to pay under the contract?

A. I agreed to pay this $800 on the contract. I wasn't asked to.

Q. And that's the $800 that——

A. That's the $800 that I agreed to give him.

Q. That is, it had nothing to do with the note or mortgage at all? A. Yes.

Mr. Donart: Just a minute.

A. Yes, it does.

Mr. Donart: That is objected to as asking for a conclusion of the witness.

The Court: If he knows, let him answer.

A. This $800 was paid at the time the contract was drawn to be deducted from the gains put on the cattle at the [17] termination of the contract. That was understood.

(Testimony of James R. Yost.)

Q. (By Mr. Shepard): Mr. Bailiff, hand him Exhibit No. 5, pelase.

(Witness handed Exhibit 5.)

Q. (By Mr. Shepard): Mr. Yost, you stated that you are acquainted with Mrs. Morrow?

A. Yes, I met her, yes.

Q. And did you discuss the making of this note and mortgage with her?

A. No, sir, I did not. I merely requested her signature to be put on the note, if I——

Q. You requested that of her personally?

A. No, I did not. I asked Mr. Butcher.

Q. And did you request Mr. Butcher to have that done because Mrs. Morrow owned the land?

A. There wasn't sufficient security; I felt there wasn't sufficient security.

Q. Just answer the question. Did you ask her to put that on there because she owned the land?

A. Yes, I did.

Q. Now, getting to the feed which is set out in this mortgage, where was that feed at the time the mortgage was executed?

A. That feed was supposed to be on the Clayton Butcher property. [18]

Q. And it was, is that correct?

A. Apparently not, no.

Q. Well, do you know? A. I don't know.

Q. You don't know whether it was or not?

A. I know that he showed me some feed but how much I don't know.

Q. Who made up this mortgage?

(Testimony of James R. Yost.)

A. Mr. Hal Henigson, attorney at Nyssa.

Q. Whose attorney is he?

A. He was attorney acting on the case at the time.

Q. Was he your attorney?

A. Not necessarily, no. We just asked him to draw the contract.

Q. Who was "we"?

A. Myself. I guess I should say—I say "we"—I should say myself. I asked him to draw the contract.

Q. You asked him to draw the contract?

A. That's right.

Q. Did you ever go over to Mr. Butcher's place and inspect that feed?

A. I was there a number of times, yes.

Q. You were? A. That's right.

Q. What business are you in, Mr. Yost? [19]

A. What business am I in?

Q. Yes.

A. I'm a livestock loan appraiser for the First National Bank of Portland.

Q. A livestock loan appraiser?

A. That's right.

Q. And where do you reside?

A. I reside at Nyssa.

Q. And do you have occasion to travel extensively through the Nyssa area on both the Oregon and the Idaho side of the river? A. Yes, sir.

Q. And do you loan money on livestock for the bank? A. Yes, sir, that's right.

(Testimony of James R. Yost.)

Q. That is your business. How long have you been in that business? A. Five years.

Q. Five years. And who furnished the figures on this feed for Mr. Henigson to put in this mortgage?

A. Mr. Butcher furnished the figures to be put in the contract.

Q. Now are you talking about the contract or the mortgage? A. In the mortgage.

Q. In the mortgage.

A. Those are the figures that were given at the time that the mortgage was drawn. [20]

Q. Who gave those figures to Mr. Henigson, you or Mr. Butcher?

A. I believe Mr. Butcher gave them to him.

Q. When, if you know?

A. I don't know the exact time. No, I don't.

Q. You never gave them to Mr. Henigson yourself? A. No, sir.

Q. How many times would you estimate that you inspected the feed on Mr. Butcher's ranch?

A. Oh, I would say I was there probably at least once a month during the winter.

Q. I am talking about prior to the winter.

A. Prior to——

Q. Prior to the winter season 1955.

A. Prior to the contract or any of the——?

Q. Let's say between the dates July 5 and October 15, 1955, how many times were you on that ranch? A. Well——

Q. Your estimate.

A. It would be hard for me to say. I had some

(Testimony of James R. Yost.)

pasture bought from Mr. Butcher at that time for some cows that I owned and it would be hard to say exactly how many times I was there.

Q. Now, as a matter of fact, you had a discussion with Mr. Butcher about how many head of calves this feed would probably winter, didn't you?

A. Yes, I did. We discussed it.

Q. And you told him that you estimated that would feed 400 head of cattle, didn't you?

A. No, sir, I did not. Mr. Butcher——

Q. You did not?

A. Mr. Butcher asked me for 600 head of calves to start with, and then during our conversation, sometime later, some later date, he came back and said, "I don't believe I have enough feed for 600 but I can feed 400."

Q. Now, this contract which you entered into on July 15th with Mr. Butcher, that was a part and parcel of the whole deal, the note and the mortgage and the contract, they were all one deal, weren't they? A. No. The contract——

Q. What was secured by the mortgage?

A. The feed.

Q. And where was the feed going to go?

A. He asked me for the $6500 after the contract had been drawn.

Q. Where was the feed going to go?

A. The feed was to be fed.

Q. And you knew that? A. Yes, sir.

Q. And whose cattle was this to be fed to?

A. To mine but shortly after the mortgage was

(Testimony of James R. Yost.)

drawn, a man [22] by the name of Caruthers moved some big cattle in there and these cattle were fed out of the same ensilage pit that was supposed to be mortgaged to me, and these cattle were fed all winter.

Q. Did you visit those cattle during the winter?

A. Yes, sir, I did.

Q. Now, whose cattle were those 400 head that were furnished?

Mr. Donart: That's objected to as being immaterial.

The Court: Overruled.

A. Those cattle, according to my agreement——

Q. (By Mr. Shepard): Just state whom they belonged to, not according to any agreement. Whom did they belong to?

A. Those cattle, 96 head of them belonged to me, and 300 head of them belonged to John Stringer.

Mr. Shepard: I move the admission of Defendants' Exhibit No. 6, if your Honor please, at this time, that being the contract.

The Court: It may be admitted.

(Whereupon, Defendants' Exhibit No. 6 for identification was received into evidence.)

Q. (By Mr. Shepard): Mr. Yost, this contract was entered into on or about July 15 of 1955, is that correct? A. That's right.

Q. At that time who did you represent to be the owner of [23] the cattle delivered to Mr. Butcher?

A. This was discussed at great length at the time this contract—prior to this contract. Now, it

(Testimony of James R. Yost.)

was discussed with Mr. Butcher that I could not purchase all of the cattle and that I would guarantee him to get him 400 head of cattle to feed, which I did. I asked John Stringer to furnish the other 300, and he did. Now, these cattle were top quality first class feeder cattle that he received at the time that he took these cattle.

Q. Now referring to the second paragraph on the first page of this contract, does that provide that you were to own these cattle?

Mr. Donart: Just a minute. That is objected to upon the ground that the paragraph speaks for itself.

The Court: Objection sustained.

Q. (By Mr. Shepard): You signed this contract, did you not?

A. Yes, sir. Yes, I did.

Q. Are any representations in this contract contrary to those which you state now that you made to Mr. Butcher orally?

A. I believe here there is a misprint of where it says—one place here—I don't find it right now. But according to our oral agreement he knew that the cattle would be belonging to someone else.

Q. Did you agree orally that those cattle were to remain [24] —that title to those cattle was to remain in you at all times during the course of that winter?

A. According to the contract, I believe.

Q. I said "orally".

(Testimony of James R. Yost.)

A. I believe that the cattle was to remain in my title, yes, in my name, that's right.

Q. You were to have title all through the winter?

A. I was to have charge of the cattle, you might say; not title necessarily, no.

Q. Is that contrary to what is contained in this agreement?

Mr. Donart: We make that the same objection. Whether the "oral agreement" is contrary to the agreement would be best determined by the agreement itself.

The Court: Sustained.

Q. (By Mr. Shepard): Now 300 head of these cattle were Stringer's?

A. That's right, 300 head of them belonged to Stringer.

Q. And you had to deal with Stringer. Then you were to take charge of his cattle, is that correct?

A. That's right.

Q. You were acting then as his agent?

A. That's right.

Q. Or did you have a contract with him yourself?

A. No, sir, I had no contract with John Stringer. [25]

Q. As a matter of fact, did you not have a deal with Mr. Stringer that you were to get 3 cents or more per pound weight gain?

Mr. Donart: Now, just a minute. That is ob-

(Testimony of James R. Yost.)

jected to as immaterial, not within the issues of this case.

The Court: Objection sustained. Thus far Stringer does not appear as party litigant to this controversy.

Q. (By Mr. Shepard): In other words, Mr. Stringer just let you take these 300 head of cattle, is that correct? A. That's right.

Q. Did he ever transfer title of them to you?

A. No, sir. The cattle remained in his name.

Q. Did you have an obligation to return them to him?

Mr. Donart: The same objection, and it is improper cross examination, along with it.

The Court: Objection sustained. That is purely collateral. Whatever agreement this plaintiff had had with John Stringer is not an issue of this case.

Q. (By Mr. Shepard): Where did this $7300 come from, Mr. Yost?

Mr. Donart: Same objection.

The Court: Same ruling; sustained. That is collateral.

Q. (By Mr. Shepard): Did you know what that feed was being used for during the winter? [26]

A. Yes, sir.

Q. And during that whole winter you inspected the cattle frequently, did you not?

A. Yes, sir, I did.

Q. At approximately what intervals, once or twice a week, perhaps?

A. No. I would say at least once a month.

(Testimony of James R. Yost.)

Q. And you were able to determine from the inspection as to what they were being fed and where the feed was coming from, is that correct?

A. Well, I wasn't able to determine how much feed was being fed them.

Q. Now, is Mrs. Morrow any party whatsoever to this contract, so far as you knew—the contract I am talking about?

A. No, sir, Mrs. Morrow doesn't appear on the contract.

Q. You didn't discuss that contract with her? She had no part of it insofar as you knew?

A. No, sir. Not at all.

Q. None of her cattle appear in that——

Mr. Donart: That is objected to as being immaterial. She signed the note. Now, whether he discussed it with her or not, whether she is an accommodation maker, the liability is there.

The Court: The objection is sustained.

Q. (By Mr. Shepard): Did you ever discuss with Mrs. [27] Morrow the feeding of this feed?

Mr. Donart: The same objection.

The Court: Overruled.

A. No, sir. Mrs. Morrow——

Q. (By Mr. Shepard): Just answer the question. Did you ever discuss it with her?

Mr. Donart: Just a minute. I believe if he wants to explain his answer——

The Court: He may explain his answer.

A. Mrs. Morrow was never talked to at all about this contract between Butcher and I. Anyone that

(Testimony of James R. Yost.)

had talked to her was strictly within her own relation or someone else that talked to her. All I did was insist that she be countersigned on the note before I made the loan.

Q. (By Mr. Shepard): Because she owned the property?

A. Because she owned the property, that's right.

Q. Did you ever discuss with her the feeding of this feed to yours and Mr. Stringer's cattle?

A. I don't quite understand, what do you mean did I ever discuss the feeding with her?

Q. During the winter that the cattle were being fed this feed, did you ever discuss that matter with her at all? I will put it this way: Did you ever see her during that winter, to your recollection?

A. Yes, I was over there several times and she was there. [28]

Q. She was there several times?

A. That's right.

Q. Where did she live, if you know?

A. I don't know her post office address.

Q. I beg your pardon?

A. I don't know her post office address.

Q. But she was there several times during the winter? A. That's right.

Q. Did you discuss the feeding of those cattle during that winter? A. I don't recall.

Q. Did you ever discuss the status of this feed, how much was left or anything of that type with her? A. I don't believe so.

(Testimony of James R. Yost.)

Q. Do you know the value of ensilage during that period of time?

A. I think so, yes.

Q. What was the approximate valuation of a ton of ensilage at that time?

Mr. Donart: Objected to as being immaterial, improper cross examination.

The Court: No, I think that might throw some light on the situation, especially in view of the fact that I am going to determine the value of that ensilage at the conclusion of the case. [29]

A. I would say the market value of that ensilage was $7 a ton.

Q. (By Mr. Shepard): $7 a ton?

A. $7 a ton.

Q. Now, what was hay worth that winter per ton? A. As I recall, about $20.

Q. As a matter of fact, hay sold during that winter for $35 a ton, didn't it?

A. I don't know. I don't know if it did.

Q. Now, you are in the cattle business, you have been for five years. Now, do you know what hay sold a ton that year or don't you?

Mr. Donart: Now, just a minute. That is objected to unless he fixes the time. Hay would sell in the fall of the year at one price and if he got a shortage along in the winter it might sell for twice that.

The Court: Fix the time, Mr. Shepard.

Q. (By Mr. Shepard): Let's say in February of 1955, what did that hay sell for a ton?

(Testimony of James R. Yost.)

A. I can tell you what I bought hay for.

Mr. Donart: Just a minute. That is objected to as immaterial. The only place where the cost of hay would be material here would be what it was worth either at the time the contract was made or at the time the mortgage was entered into. [30]

The Court: Overruled. You may answer the question.

A. After I took these cattle back from Butcher——

Mr. Shepard: Just answer the question, please, Mr. Yost. Do you know the valuation of hay per ton?

A. This will answer your question fully, if you will let me proceed.

Q. In February—Excuse me—Go ahead.

A. When he was out of feed, I left my cattle in his yard for possibly two weeks. I purchased hay from his neighbor, chopped hay in the stack, for $20. Does that answer your question?

Q. That was when? A. This was April.

Q. That was in April?

A. That was in April, yes, sir.

Q. Now, how about January of that year, do you know what hay was worth?

A. I would say probably about the same price.

Q. About $20 a ton? A. I think so.

Q. Did you try to buy some hay in April from Mr. Fritz? A. From Mr. Fritz?

Q. Yes.

A. No, sir, I never talked to Mr. Fritz. [31]

(Testimony of James R. Yost.)

Q. I beg your pardon?

A. I never talked to Mr. Fritz.

Q. Did you ask Mr. Butcher to go to attempt to purchase some hay for you from Mr. Fritz?

A. I don't believe so, no.

Q. What was grain worth that winter per ton?

A. What kind of grain are you referring to?

Q. What kind of grain did you have in mind when you made up this mortgage?

A. I believe it was barley.

Q. Mixed with barley and what else?

A. What does the contract call for? (Witness examining.) Well, I think I can give you a price, if you will tell me what kind.

Q. I asked you what kind of grain you had in mind in this mortgage, when the mortgage was made up.

A. You will have to ask Mr. Butcher about that. I don't know what kind of grain he had. He just listed his grain.

Q. As a matter of fact, did you not go out there and inspect the granary?

A. No, sir, I did not.

Q. Let's say if the grain consisted of ground corn and barley, would you estimate that would be worth per ton?

A. Oh, 45 to $50, somewhere near there.

Q. How about straw, did that have a going rate —about [32] $10 a ton?

A. Straw? I don't recall he used any straw.

(Testimony of James R. Yost.)

Q. Was there straw covered in the mortgage here?

A. Was the straw covered in the mortgage?

Q. Yes.

(No response.)

Q. You have it there in front of you, Mr. Yost.

A. Would you give me that mortgage?

Q. I'm sorry, I thought you had it in front of you when I was questioning you.

A. (Witness examining.) I don't seem to find any place that straw is mentioned in here.

Q. Try looking on the first page of that mortgage, Mr. Yost.

A. (Witness examining.)

Mr. Donart: Well, both in the interest of time and otherwise we object to it upon the ground that the mortgage itself is the best evidence. I don't see where it is covered.

The Court: The objection will be overruled. However, do you have it there for reference, the reference you are asking for?

Mr. Shepard: Yes.

The Court: Then show it to him.

Mr. Shepard: I have attempted to point it out in the exhibit. It is on the first page. [33]

The Court: Point it out to him.

Mr. Shepard: May I?

The Court: Yes.

(Counsel showing witness.)

A. 40 tons of straw, yes.

(Testimony of James R. Yost.)

Q. (By Mr. Shepard): What was that worth a ton?

A. Well, I don't know exactly what straw was worth.

Mr. Donart: Pardon me. Did I misunderstand your question? What are you asking him about?

Mr. Shepard: What was straw worth.

Mr. Donart: Thank you. I thought you said "salt".

Q. (By Mr. Shepard): Did you understand me, Mr. Yost?

A. Straw, yes. I couldn't say what that straw was worth at this time. I don't know.

Q. How about the ear corn?

A. Ear corn at that time was probably worth about $35 a ton.

Q. $35 a ton? A. Yes.

Q. Was that ground?

A. No, that would be whole. I don't know what they had charged for grinding.

Q. $4 a ton, would it be unreasonable, to grind it?

A. I think that is probably a little high. I don't know. I think they charged about $3, two and a half to $3. [34]

Q. Now, these cattle which were delivered pursuant to this agreement, these were supposed to come from Jordan Valley, is that correct?

A. The cattle themselves, no.

Q. The cattle themselves were supposed to come from Jordan Valley? A. No, sir.

(Testimony of James R. Yost.)

Q. They were not?

A. There was no designated place that these cattle were to come from.

Q. You didn't ever represent to Mr. Butcher where these cattle were to come from, is that correct? A. Yes, I did.

Q. Where did you represent they were going to come from?

A. Coming from Oregon, where they were.

Q. Were they to be brought from to his place?

A. At the time the contract was drawn this was talked with Mr. Butcher, he knew he was going to get John Stringer's cattle from the time the contract was drawn, from then on he knew he would get John Stringer's cattle.

Q. So this written agreement meant absolutely nothing to either one of you, is that correct?

A. What do you mean it meant nothing to us?

Q. You state that he knew he was going to get John Stringer's cattle. This agreement proves that you were going [35] to furnish the cattle and you were going to own them? A. No.

Mr. Donart: That is objected to upon the ground that the exhibit is the best evidence as to what it provides.

The Court: Objection sustained.

Mr. Shepard: And those cattle actually came from where, the 300 head that belonged to Stringer, if you know, where did those come from?

A. Those 300 head came from Stringer's ranch.

Q. Where? A. At Nyssa.

(Testimony of James R. Yost.)

Q. Is that a ranch or feed yard in Nyssa?

A. It is a feed yard.

Q. It is a feed yard? A. That's right.

Q. Were they on feed or pasture then?

A. They were on feed.

Q. They were on feed? A. Yes, sir.

Q. Did you see those cattle when they were unloaded out of Stringer's feed yard?

A. Yes, sir, I did.

Q. And they were absolutely full, weren't they?

A. No, not necessarily overly full. They were shrunk 3 percent in and they were shrunk 3 percent out. The same [36] weighing condition that cattle went in, they came out the same.

Q. They were shrunk 3 percent coming in?

A. That's right.

Q. That is the agreement for that?

A. I think that——

Q. Just answer the question, if you know.

Mr. Donart: Just a minute. Again, that is objected to upon the ground that the agreement is the best evidence of what it provides.

The Court: Sustained.

Q. (By Mr. Shepard): Did Mr. Butcher agree with you that those would be shrunk 3 percent coming in?

A. I think Mr. Butcher agreed with John Stringer that they would be shrunk 3 percent coming in and going out.

Q. Did Mr. Butcher have a contract with Mr. Stringer? A. No, he didn't.

(Testimony of James R. Yost.)

Q. You had the contract with Mr. Stringer?

A. That's right.

Q. So you had an agreement with Mr. Butcher how they would be shrunk coming in?

A. Yes, I did.

Q. What was that agreement?

A. 3 percent.

Q. Was that in writing? A. No, sir. [37]

Q. They would be shrunk going out 3 percent?

A. They would be shrunk going out 3 percent.

Q. That was in writing, was it not?

A. They were to be shrunk 3 percent going in.

Q. And the shrinkage, as far as the outbound weights of 3 percent, was in writing, was it not?

A. I believe that the shrinkage—the contract states that the same condition would be in and out. He received the cattle——

Q. Do you still have that copy of the agreement in front of you? A. Yes, sir, I do.

Q. All right. Would you point out to me where it says 3 percent shrinkage coming in in that contract?

Mr. Donart: The witness hasn't testified that the contract said that, and we would object to that.

The Court: He said he believed it did. Didn't you say that?

A. Pardon?

The Court: Didn't you say that you believed that the contract did provide for shrinkage of 3 percent in and for 3 percent out?

(Testimony of James R. Yost.)

A. I believe the contract says—. Can I read it to you?

The Court: Yes.

A. "Upon completion of the feeding period or any sooner [38] termination thereof, the Second Party shall return said cattle to the First Party upon demand and the latter shall thereupon have the same weight on outbound scales at Nyssa, Oregon with the 3 percent shrinkage, which latter weight shall be accepted by the Second Party as the outbound weight to be used in determining the gain for which the Second Party shall be entitled to payment."

The Court: All right. The objection is overruled.

Q. (By Mr. Shepard): Now, how about the inbound? You stated that you thought, if I understood you correctly, that you thought they were 3 percent shrinkage both inbound and outbound as far as the contract. Now, will you read the provision of the contract—. Does it provide for inbound weight?

A. The cattle were shrunk 3 percent in. That is what I said.

Q. When you say "shrunk 3 percent," what do you mean by that?

A. Well, shrinkage on cattle is a way of determining the fill that is in them. Now, 3 percent, any animal or any bunch of animals that is shrunk 3 percent, 3 percent of the gross weight of the cattle, that figure is deducted and that is your net weight of cattle.

(Testimony of James R. Yost.)

Q. Now, as far as the inbound weight is concerned, you [39] agreed with Mr. Butcher that the weight which you received when you bought them from your seller would be accepted by Mr. Butcher, did you not?

A. Yes, and those cattle were bought on a shrinkage, they were bought——

Q. And the cattle that you are talking about when you made that agreement with Mr. Butcher were the 400 head, is that correct?

A. Yes, any of the 400 head of cattle that he received would be received on the shrinkage, that's right.

Q. And the weight of those 400 head of cattle which you paid for, those cattle would be accepted by Mr. Butcher, is that correct?

A. That's right.

Q. Now, as a matter of fact, at least 50 head of those catle were never weighed, were they?

A. All of those cattle were.

Q. Inbound? A. Inbound, yes, sir.

Q. Every single one of those cattle delivered was weighed inbound?

A. All those cattle were weighed.

Q. And how many head of those cattle, Mr. Yost, did Mr. Butcher lose during that feeding period? A. I believe two. [40]

Q. Now, those cattle were taken out of Mr. Butcher's place, were they not?

A. That's right.

Q. By whom? A. By me.

(Testimony of James R. Yost.)

Q. Anybody else? Mr. Stringer, for example?

A. No, no. I took the cattle. I took the cattle back on April the 6th.

Q. And where did you take those cattle?

A. Where did I take the cattle?

Q. Yes.

Q. I took 300 head of those cattle to Sand Hollow to grass and turned them over to Mr. Stringer.

Q. Whose ranch was that?

A. I turned them back to Mr. Stringer at that time.

Q. And what did you do with the others?

A. The others, I bought feed there from a near neighbor and fed them in the yard for possibly ten days.

Q. Where? A. At Butcher's.

Q. And did you also pasture them?

A. I did, yes, sir, for about ten days.

Q. Did you feed them yourself?

A. I did.

Q. You stayed there all during the ten days?

A. I hired a man to feed them.

Q. Who did you hire?

A. A man by the name of Edison, I believe.

Q. And you say his name is Edison?

A. I believe so.

Q. And who did you know him as? Who did you know him as?

A. Who did I know him as?

Q. Yes. You knew him as Mr. Butcher's hired hand, didn't you?

(Testimony of James R. Yost.)

A. I don't believe he was in Butcher's employment at the time. At least, he didn't.

Q. Had you seen him at all during the winter?

A. He had lived in a house on one of Butcher's lower places, but——

Q. Had you seen him feeding those cattle during the winter? A. No, sir, I did not.

Q. You didn't. What kind of a winter was that, Mr. Yost?

A. Oh, I would say it was an average winter.

Mr. Shepard: That's all.

Redirect Examination

Q. (By Mr. Donart): You say that you removed the cattle from the feed lot?

A. Yes, sir. [42]

Q. State whether or not Mr. Butcher was there?

A. Yes, he was.

Q. And why did you remove the cattle?

A. Because he was completely out of feed at the time that I took the cattle back.

Q. All right. And what else?

A. And the cattle at this time were barking the trees in a locust grove and were down in a sand pile eating sand and it was apparent that they weren't going to live very long and they were the roughest looking cattle I had ever seen to come out of a feed yard.

Q. In other words, in what condition were the cattle when you took them off the feed lot?

A. They were very poor. I believe they were the

(Testimony of James R. Yost.)

worst looking cattle that I have ever seen to come out of a feed yard.

Q. In your opinion were those cattle at that time being given proper care and feed?

A. No, sir, they were not.

Q. Did Mr. Butcher make any objection to your taking them off the feed yard at that time?

Mr. Shepard: We object to this conversation unless arrived at in the usual way.

The Court: Lay the foundation for the conversation.

Q. (By Mr. Donart): Well, what conversation did you have with Mr. Butcher when you took the cattle off the feed lot? [43]

A. Well, I went to Mr. Butcher and explained the condition of the cattle, I asked him if he would return them to me. He readily agreed because, he said he was out of money and out of feed.

Q. What? I didn't get your answer.

A. I went to Mr. Butcher and he said that he would turn the cattle over to me because he was out of money to buy more feed and was out of feed.

Q. Was that why you took them back?

A. That is why I took them back.

Q. Now, in connection with this contract that has been admitted in evidence—I think it is Defendants' Exhibit 6—did you solicit Mr. Butcher for a contract of that kind or did Mr. Butcher solicit you?

A. Mr. Butcher approached me to furnish him 600 head of cattle first.

(Testimony of James R. Yost.)

Q. And I believe you explained why it was 400 instead of 600?

A. That's right. He asked me for 600 and then later came back and said that he had decided that he wouldn't have enough feed for 600 and he would like to have four. And the way it turned out, he didn't even have enough feed for those.

Mr. Donart: You may cross examine.

The Court: We will take a recess now.

(Short recess taken.) [44]

Recross Examination

Q. (By Mr. Shepard): Mr. Yost, when you went over to get those cattle at Mr. Butcher's place, where in particular on the ranch were they, on the high part of the ranch or in the lower part?

A. I didn't hear the first part of your question.

Q. When you went to get those cattle from his place, where were those cattle in particular, were they in the pens in the lower part of the place or on the higher part of the place, or what?

A. At Mr. Butcher's place, you mean?

Q. Yes, at the time you went to get them.

A. Well, he had them in two bunches. He had one bunch at the lower end of his place and one bunch on the upper end of his place.

Q. One bunch on the upper. What was the average daily ration that you and Mr. Butcher had agreed on to feed those cattle?

A. Daily ration, you say?

Q. Yes.

(Testimony of James R. Yost.)

A. I believe the contract calls for—just a minute, let's see if we can find what his contract calls for here (examining). The contract calls for 15 pounds of ensilage, two to three pounds of grain, and approximately five pounds of hay or its equivalent for each animal. [45]

Q. In your opinion, was that an adequate and satisfactory ration to feed those cattle through the winter?

A. On that kind of ration, an average animal should gain at least a pound a day, and that would be the minimum feeding, and they could gain a pound and three-quarters per day. Now, these animals that he received were Number One choice top quality feeders, there was no better feeder calves in the country than the calves that he received. These calves that he received from John Stringer were cut off of a bunch of cattle——

Mr. Shepard: Your Honor, I move to strike all of the voluntary statements of the witness.

The Court: Motion granted.

Q. (By Mr. Shepard): Now, the reason that those cattle were taken out of there is because Stringer had good grass up at Sand Hollow and he wanted to put them on the grass, isn't that correct?

A. No, sir.

Q. You left yours there. A. I left mine.

Q. In the pasture to feed?

A. I left mine there and bought feed myself for them, yes, sir.

Q. And pastured them also?

(Testimony of James R. Yost.)

A. And pastured them, yes. [46]

Q. And they did well, didn't they?

A. No, they did not.

Q. Yours did not?

A. No, mine did not.

Mr. Shepard: I think that is all.

Redirect Examination

Q. (By Mr. Donart): Now, you have had experience, I take it, as a stock feeder? A. Yes, sir.

Q. And observing feeding of stock?

A. Yes, sir.

Q. Is the 15 pounds of ensilage, five pounds of hay or its equivalent and the two to three pounds of grain a ration upon which cattle such as these would normally gain? A. Yes, sir, it is.

Q. Were these good cattle?

A. They were extremely good cattle. I would say they were choice feeder cattle.

Q. And what ages were they? That is, were they coming yearlings or what?

A. They were weaners, coming yearlings.

Mr. Donart: I believe that is all.

Mr. Shepard: I think that is all.

The Court: Step down; next witness.

(Witness excused.) [47]

JOHN STRINGER

called as a witness by the plaintiff, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name and occupation for the record. A. John Stringer.

Q. What is your occupation, Mr. Stringer?

A. Livestock and farming.

Direct Examination

Q. (By Mr. Donart): Where do you live, Mr. Stringer?

A. Well, I live in Pocatello, Idaho, that is my residence but I spend quite a lot of time at Nyssa, Oregon, in the winter time.

Q. You divide your time between McCall and Nyssa?

A. Yes. The winters at Nyssa, Fall and Winter. I spend about four months at Nyssa. The balance of the time I spend at the other place.

Q. What has been your principal occupation through the last ten years?

A. Well, I run sheep and feed cattle, pasture cattle.

Q. You also raise cattle?

A. Yes, I raise cattle.

Q. You are rather extensively in that business, I take it?

A. Well, I don't know whether you'd call it extensive or [48] not, but I run a reasonable number of livestock.

Q. Just a little louder, Mr. Stringer. Have you been here in the courtroom and heard the testimony

(Testimony of John Stringer.)

up to now in this case? A. Yes, I have.

Q. You are acquainted, I believe, with Mr. Butcher? A. Yes, I am.

Q. How long have you known him?

A. Well, I wouldn't know for sure but I would say 12 or 15 years.

Q. Are you the John Stringer whose cattle, as testified, pertained to the Butcher Feed Lot?

A. I am.

Q. Before those cattle were taken to the feed lot, state whether or not Mr. Butcher came over to your place and had a conversation with you with respect to those cattle. A. I wouldn't——

Q. Just tell whether he did.

A. I wouldn't say whether he came to my place or whether I saw him downtown some place, but we had a conversation about the cattle.

Q. And was that before the cattle were—while they were still on your feed lot?

A. Well, it might have been even before I had these cattle in my feed lot, before I received them. I am pretty [49] sure it was.

Q. You had them on your place?

A. I don't think I had these cattle on my place at the time we talked about it.

Q. All right. Did you have just one conversation or more than one?

A. I think just one, I think.

Q. All right. Tell us the substance of that conversation.

A. Well, there wasn't very much to it. It seemed

(Testimony of John Stringer.)

—there seemed to be a question in his mind as to what kind of——

Mr. Shepard: Object to the question——

The Court: Objection sustained.

Q. (By Mr. Donart): Just tell what he said, what he asked you and so forth.

A. Well, he just told me he understood he was going to get some of my cattle through Jimmy Yost and he wanted a fair weighing condition on it. Now, that's about all we talked about. I think we did talk certain cattle that I had bought that I might give him.

Q. Do you think there was some discussion as to what cattle you might give him?

A. Yes. And I think there was some discussion about some some of these cattle not being dehorned, and he didn't have facilities to do it very well there. I think there was some [50] discussion about using cattle that were dehorned.

Q. And which did you give him, dehorned cattle or cattle with the horns on?

A. I gave him all——

Mr. Shepard : Object to that, if your Honor please. There has been no testimony, no evidence that Mr. Stringer gave Mr. Butcher any cattle.

Mr. Donart: Well, which cattle were taken from your place, dehorned cattle or cattle with the horns on, taken from your place to Butcher's?

A. Well, they were all dehorned cattle.

Mr. Shepard: We will object to this unless some

(Testimony of John Stringer.)

foundation is laid to show Mr. Stringer knows where those cattle went to.

The Court: Come, come, counsel, we haven't got a jury here. The objection is overruled.

Mr. Donart: You may cross-examine.

One other question, pardon me.

Q. You heard the testimony of the ration that was supposed to be given, fed to those cattle, 15 pounds of ensilage, five pounds of hay, and two to three pounds of grain, you heard that testimony?

A. Yes, I did.

Q. State whether or not in your experience as a feeder that is a ration upon which cattle, such as you furnished at [51] that time, would normally gain weight?

A. Well, I would say that I feed my cattle a little bit more than that. I would say that they should gain at least a pound a day.

Q. All right. Did you see those cattle—did you go over to the Butcher Feed Lot and see those cattle just before they were removed by Mr. Yost?

A. I saw those cattle about the 1st of April. That's when I first saw them.

Q. In what condition were they about the 1st of April? A. Well, it wasn't very good.

Q. Well, just describe it.

A. They looked to me like they barely made it through the winter. They were not in good condition at all. They were not dying but they were quite thin.

Q. Did they look to you like they were as heavy

(Testimony of John Stringer.)

as they were when you delivered them in the fall before? A. I didn't think so.

Mr. Shepard: I am going to object——

A. I didn't think so.

The Court: Overruled.

Mr. Donart: You may cross-examine.

Cross Examination

Q. (By Mr. Shepard): Mr. Stringer, the rations that cattle would need to [52] gain weight or even stay healthy, would be determined in large part by the weather over a winter, wouldn't it?

A. By the what?

Q. Would be determined in large part by the weather over the winter, wouldn't it?

A. Oh, I wouldn't say so. The cattle will eat a little more in bad, cold weather, but I wouldn't say that would have too much to do with it. It takes so much to feed, so much feed to feed an animal and make him gain or even keep him alive.

Q. In other words, if it were a mild winter, with the temperature getting to, say, below 20 to 25 above, cattle would not require any more or any less in temperatures like that than they would in 10 to 20 below, is that correct?

A. I would say that cattle would require a little more feed in cold weather but they would probably do just as well.

Q. And—— A. Probably better.

Q. You were in California the largest part of that winter, were you not? A. Yes, I was.

(Testimony of John Stringer.)

Q. So you don't know what the weather was like other than what somebody might have told you?

A. Well, I have some idea what the weather was like. I don't just go away and completely ignore what I am doing. [53]

Q. How is the grass coming on at your Sand Hollow ranch the first part of April?

A. Well, I would say it wasn't very good. It's never very good the first part of April.

Mr. Shepard: That is all.

Mr. Donart: That is all.

(Witness excused.)

The Court: Next witness.

Mr. Donart: Plaintiff rests.

The Court: Proceed.

Mr. Shepard: If your Honor please, at this time the defendant Morrow moves for a dismissal of the action as to her on the basis that plaintiff's own evidence on direct and cross-examination has shown there is no consideration involved whatsoever as to the said defendant Morrow, and further, on the theory that if she is considered by the Court to be an accommodation maker on said instrument, that the security has been dissipated, and there has been no showing that she has made any consent to that dissipation.

The Court: I will reserve ruling on that until the completion of the case in accordance with the rule.

Call your witnesses.

Mr. Shepard: Call Mr. Clayton Butcher.

CLAYTON A. BUTCHER

one of the defendants herein, called as a witness in his own [54] behalf, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name and occupation for the record.

A. Clayton Butcher, I am a farmer.

Direct Examination

Q. (By Mr. Shepard): Where do you reside, Mr. Butcher? A. Over at Parma, Idaho.

Q. You operate a ranch over there?

A. I do.

Q. How many acres do you operate?

A. Around 240.

Q. You are one of the defendants in this action?

A. Beg your pardon?

Q. You are one of the defendants in this action?

A. I am.

Q. You heard the testimony regarding the—the preliminary testimony regarding the note and the mortgage in this case? A. I have.

Q. And you executed that note and mortgage, you signed it? A. I did.

Q. Will you state the circumstances leading up to the execution of that note and mortgage and contract, Mr. Butcher?

A. Well, it was in July that Mr. Yost drove out to my place. I was irrigating corn, and he asked me what I was going [55-56] to do with all of my feed. And I told him I was going to sell it, that was the reason for it, what I was raising it for, and I had

(Testimony of Clayton A. Butcher.)

a note to meet that fall at the bank, that I had to pay on.

Well, he said he could get the money to buy 1,000 head of cattle with. He wanted to put them out on feed.

And I told him well, I couldn't feed no such number of cattle.

He said, "Could you feed 600?"

And I said, "No, I could feed around three to four hundred."

And so we just kept talking, and so he came out another time and wanted to know if I knew of anybody else that would be interested in that kind of a deal that he could put these cattle out on.

I said, "There's a fellow down at Parma, Mr. Dola." And so we went down to see him and——

Mr. Donart: Now, just a minute. That is objected to as being immaterial.

The Court: Overrule the objection.

Q. (By Mr. Shepard): Go ahead.

A. And he said that Mr. Dolan—. He thought it over and called me a time or two and he told me to tell Mr. Yost he wasn't interested in it, that he didn't, he figured, had enough—that he had feed enough that he wanted to bother with [57] the calves.

So then when Jim kept coming out and talking to me, I told him that I would have to have some money to pay the bank off before—so I wouldn't have to sell that feed—if I fed any cattle. He said he would fix that, he would get money for it, which

(Testimony of Clayton A. Butcher.)

he did. He gave me $800 there to bind the deal, and at the time there was nothing said about any note or mortgage or anything. He said he would have his attorney fix up the contract, and he had done that.

Q. (By Mr. Shepard): That was the contract which you signed on July 15? A. Yes.

Q. And you stated nothing was said at that time about a note or mortgage?

A. No, there wasn't.

Q. Will you state what happened after you signed the contract, when did this note and mortgage come up?

A. Well, it came up later. He put in a few head of cattle of his, that he trucked in there, and I told him, I said, "My mortgage note is getting due at the bank and I am going to have—you're going to have to dig that money up, I have got to pay them."

Well, he said he would do it, and he come back in a day or two and told me, he said, "I have got to have a note and mortgage from you before I can get the money to pay you." [58]

And I said, "Why is that? I have got the feed there. You have got your security. Why do you want that?"

Well, he said, "I have got—just got to have it, I have got to have your mother-in-law sign it."

I said, "Why does she have to sign it?"

Well, he said, "She owns the land. She might run us off of here or something".

(Testimony of Clayton A. Butcher.)

Q. Now, regarding that feed, was that on the property at the time?

A. Well, a lot of it, the biggest part, all but some hay and some extra feed I bought later on in the year.

Q. State what Mr. Yost did, if anything, respecting that feed.

A. Well, he just looked at it. He said I had a lot of nice feed. He said, "You have got a lot of nice grain and corn and stuff," to that effect.

Q. How many times did he inspect that feed?

A. I don't know. He was over there pretty nearly every day for a while.

Q. And did you——

Mr. Bailiff, would you give the witness Exhibit No. 2, please.

Q. Mr. Butcher, on the first page of that mortgage, I call your attention to the amounts of ensilage, corn, grain, straw and hay. [59]

Now, did you furnish those figures to Mr. Henigson, the lawyer? A. Where's that at?

Q. On the first page.

May I point out to the witness, your Honor, to save time?

The Court: Yes.

Q. (By Mr. Shepard): Right here. Did you furnish those figures?

A. No, I did not. He took them figures all down himself.

Q. Who is "he"?

(Testimony of Clayton A. Butcher.)

A. Jim Yost did. I never seen them figures until I signed the mortgage.

Q. Had you ever talked to Mr. Henigson before you signed that mortgage?

A. No, I never had.

Q. Do you know who he was?

A. No, I didn't even know his office. I had never been in it.

Q. You never used him as a lawyer?

A. I had heard that he was an attorney, yes.

Q. Mr. Butcher, if you had not had the feeding contract with Mr. Yost, would you have signed that note and mortgage?

A. No, I would not. But I didn't know what I was going to [60] do.

Q. Now, who gave you that money?

A. Mr. Yost.

Q. And how much did he give you?

A. He give me two checks, one for $800 and one for $6500.

Q. When did he give you the $800 check?

A. That was along in the summer when we talked the deal up.

Q. Was any part of that money supposed to go to Mrs. Morrow? A. No.

Q. Did she have any ownership of that feed of yours? A. Not a bit.

Q. That was all yours?

A. That was mine, yes.

Q. Did you have any ownership of any of her cattle or any of her feed on her ranch?

(Testimony of Clayton A. Butcher.)

A. No.

Q. No, she does own the land that you are operating that acreage under? A. That's right.

Q. Was she any party in any way to any feeding agreement that you had with Mr. Yost?

A. None whatever, that I know of.

Q. Will you state whether or not there had been any conversation with Mr. Yost relative to where those cattle were [61] to come from?

A. When he come out at the time we made the deal, he told me he was going to buy these cattle in Jordan Valley and these cattle would be hauled from Nyssa and weighed off trucks and brought out there, and that was the agreement he and I made up.

Then something turned up, he couldn't get the cattle or something, I don't know what happened, but that's when I started into the agreement with him—that was my idea, where the cattle was to come from, and that's what he said, where they were to come from.

Q. Now, state if you had any agreement with Mr. Yost relative to who was to own those 400 head of cattle.

Mr. Donart: Now, I make the same objection, that is calling for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Shepard): Were 400 head of cattle delivered to your place at Parma, Mr. Butcher?

A. Well, I had 397.

Q. Speak up, because we can't hear you.

A. I think there was 397, to be exact.

(Testimony of Clayton A. Butcher.)

Q. And what kind of shape were those—Strike that.

I will ask this question: Do you know where those 397 head of cattle came from?

A. No, I don't. [62]

Q. Will you state what kind of shape those cattle were in when they arrived at your place?

A. Well, 300 of them was in good shape, and the other 97, I wouldn't say that they were.

Q. Will you state what was the condition of the cattle as far as weight is concerned, whether they were—when they arrived at your place?

A. 300 of them were just as full as any cattle could get.

Q. How long have you been in the cattle business, Mr. Butcher?

A. Well, I've been in 10 or 15 years.

Q. And does that embrace feeding cattle as well as raising cattle? A. Beg pardon?

Q. Has that experience of yours been in the business of feeding cattle as well as in running cattle on the range?

A. Well, some, yes, I have done a bit.

Q. In your opinion, is it possible to stuff cattle to the point where they will be 30, 40, 50 pounds more than they ordinarily weigh?

Mr. Donart: Now, just a minute. That is objected to as being entirely outside the issues in this case. They haven't charged that these cattle were stuffed and not brought there in the shape they should have been in.

(Testimony of Clayton A. Butcher.)

The Court: Objection sustained. [63]

Q. (By Mr. Shepard): Did you have a conversation with Mr. Yost after the cattle had arrived there regarding their condition?

A. I asked him where he stopped at the filling station.

The Court: I didn't hear that.

A. I asked him where he stopped at the filling station.

Q. (By Mr. Shepard): What did he say?

A. He said, "They had been fed this morning all right." He said——

Q. Did he state where they had been fed?

A. No, he just said, "They had been fed." That is what he said.

Q. Did you refuse to accept those cattle?

A. No, I didn't.

Q. Did you weigh those cattle inbound, Mr. Butcher? A. No, I never weighed them.

Q. Were you ever furnished any bill of lading—bill of sale showing any weights on it?

A. No.

Q. Were you ever furnished any scale tickets of any certifying or bonding weigher?

A. No, I wasn't.

Q. Did you ever request Mr. Yost to show you any scale weights or any bill of sale showing the weights? A. Yes. [64]

Q. What did he say?

A. He said, "I have the figures all here. I forgot and left the ticket at home."

(Testimony of Clayton A. Butcher.)

Q. Did he ever bring those to you?

A. No, I never seen them.

Q. Whose brand was on these 300 head of cattle that came in?

A. Well, evidently Mr. Stringer's.

Q. Did you know that they were Mr. Stringer's —that that was Mr. Stringer's brand at that time?

A. No, I didn't.

Q. Did you know that that was not Mr. Yost's brand at that time? A. Yes.

Q. Did you have any conversation with Mr. Yost as to the brand on those cattle?

A. Other than I asked him when we was going to brand them.

Q. When you were going to brand them—What do you mean by that?

A. When we was going to brand them, the other 300; that we already had about a hundred of them in there, 80 or 90 of them, that I had done, something like that, that he had come and we had branded all of them, and I had asked him when we was going to brand these 300. [65]

Q. What did you brand those first 97 with, what type of brand?

A. Tomahawk on the left side.

Q. And you asked him when you were going to brand the remaining 300 head? A. Yes.

Q. What did he say?

A. Oh, he said, "Well, in a few days".

Q. And were those cattle ever re-branded?

A. No.

(Testimony of Clayton A. Butcher.)

Q. Now, approximately how much feed did you have on hand when those cattle arrived?

A. Well, I had around better than 500 ton of ensilage, between five and six hundred ton, and I had 92 or 4 ton of grain, and I had 46 ton of hay and about 35 or about 30 ton of straw.

Q. And did you have any ear corn?

A. Yes. Well, that was grain—I counted mixed grain and corn, it was corn and wheat and barley.

Q. Did Mr. Yost ever inspect that hay?

A. I showed him in the granary. He looked in the granary a time or two.

Q. Did he ever inspect the ensilage pits?

A. Well, I don't know. He was standing right there, he looked right across and seen them many a time. [66]

Q. During the time that that Mr. Yost was inspecting the grain did you have any conversation with him regarding how many cattle that feed would take care of for a winter? A. No.

Mr. Donart: Again that is objected to as being no charge that he was misled by Mr. Yost in that respect.

The Court: Do you wish to be heard on this, Mr. Shepard?

Mr. Shepard: If your Honor please, the plaintiff in their Answer to the Cross-Complaint have set forth that Mr. Butcher did not have sufficient feed at that time.

The Court: All right, I will allow the question. You may answer that.

(Testimony of Clayton A. Butcher.)

A. Well, what was that, how was that? What was the question? What was that about Mr. Yost?

Q. (By Mr. Shepard): Did you have a conversation with him regarding how many cattle that feed would care for?

A. Yes, we figured it would care for——

Q. What did he say?

A. He said it would take care of 400 or 500, he thought.

Q. Do you have an opinion as to what ensilage was worth during that winter?

A. It was worth $8 a ton.

Q. Do you have an opinion as to what ear corn and grain was worth that winter? [67]

A. Mixed grain ground and laid in was around 50 to $52, and corn was about $45 ground.

Q. And how about straw, what was that worth?

A. Straw was worth $10, 10 to 12.

Q. How much was hay worth?

A. Hay was worth $25 all over the valley.

Q. And did hay go a good deal higher that winter than 25?

A. It went, towards spring it went up toward 28 and 9, along in there.

Q. Did you feed and take care of those cattle during the winter? A. Beg pardon?

Q. Did you feed and care for those cattle during the winter?

A. Well, I did the best I could, yes.

Q. What type of weather was it that particular winter?

(Testimony of Clayton A. Butcher.)

A. Well, it rained and then it snowed, blowed and then it would freeze up and then it would warm up and get muddy. An awfully bad winter.

Q. How long have you been wintering—I mean, how long have you been ranching in that particular area? A. I have been there eight years.

Q. And how did that particular winter compare with the other seven that you have been there, as far as feeding cattle [68] are concerned?

A. Well, I believe it was the worst.

Q. Now, speak up, because we can't hear you.

A. I said I believe it was the worst, it was an awfully tough winter.

Q. And what effect did that continued raining and freezing up have on the cattle?

A. Well, it had quite an effect. We had a lot of sick ones. I know that they got sore footed, and I had 60, 70 of them in the—bunched up under a shed practically nearly all winter.

Q. Will you state what, if you know, cattle feeding conditions were generally all through that area that you were in, that winter?

A. It wasn't good, it was a pretty tough winter.

Q. Was there a considerable amount of cattle sickness that winter, through that area, all through that area? A. Yes. What I heard there was.

Q. What would you estimate to be the average death rate per hundred head of cattle that particular winter, for calves that were on feed, all through that area?

(Testimony of Clayton A. Butcher.)

A. I don't know, I imagine two or three per cent.

Q. Two or three per cent? A. Yes.

Q. Now, you stated that those cattle were sick during the [69] winter. Was that because of the weather? A. It was.

Q. Did you doctor those cattle during the winter? A. Yes, I did.

Q. How many cattle did you actually lose out of that whole bunch? A. One.

Q. One? A. Yes.

Q. Did Mr. Yost come out and inspect those cattle? A. He was there.

Q. During the course of that winter?

A. Sometimes he was there every week, I'm sure, and sometimes he was there two or three times a week.

Q. During the time that he came out and inspected those cattle during the winter did you have any conversation with him regarding their condition? A. Yes.

Q. Will you state what those were?

A. I would say, "Jim, how are they doing?"

"By golly, they're looking fine," he would say, "really doing good."

Q. To your knowledge, did John Stringer ever inspect those cattle?

A. Not till about four or five days before they took them [70] out.

Q. During the month of March, 1956, did you

(Testimony of Clayton A. Butcher.)

have any conversation with Mr. Yost regarding the condition of those cattle?

A. Yes, I had one just a few days before they took the cattle out.

Q. And what did he say about those cattle, if anything?

A. I asked him how he thought they were doing. He said, well, he thought they was doing as good as anybody's cattle was doing.

Q. Did Mr. Stringer or Mr. Yost or anyone come to you during the winter and complain about the condition of those cattle?

A. Not one word that I ever remember of. I know they didn't.

Q. Approximately what daily ration did you feed those cattle during that winter?

A. Well, during that worst bad weather there I was feeding them up around 20, 25 pounds of ensilage and about 10 pounds of hay and 4 or 5 pounds of grain.

Q. Per day? A. Yes.

Q. Will you state whether or not in your opinion the weather makes a difference in how much you have to feed cattle to keep them healthy? [71]

A. It makes a lot of difference.

Q. Will you state why?

A. Them cattle will stand around in that cold mud and rain blowing on them and it takes a lot more feed to keep that heat in their system.

Q. So you did feed them more than the actual ration called for under the contract?

(Testimony of Clayton A. Butcher.)

A. That's right.

Q. Did you ever feed them any less than the rations called for in the contract? A. No.

Q. On or about April 6, 1956, what happened to the cattle that you were feeding?

A. Jim Yost and John Stringer came out and said these cattle didn't look like they was doing any good and they was going to take them.

Q. What was that?

A. I said Yost and Stringer came out and said they thought they would take the cattle, the grass was good enough over at Sand Hollow, that they could turn them out there.

Q. Did you in any way consent to them taking those cattle?

Mr. Donart: Well, now, just a minute, that is asking the witness' conclusion of his own mental reaction.

The Court: Change the form of the question then I will allow it. [72]

Q. (By Mr. Shepard): What, if anything, did you tell Mr. Stringer and Mr. Yost when they came out there about taking those cattle?

A. I said—I told them that—I said, "The weather is good now, the cattle are doing fine, I hate to lose them now."

Q. What did they say to that?

A. Well, they said it didn't look like they were doing any good and the grass was good over at Sand Hollow and they would turn them out.

(Testimony of Clayton A. Butcher.)

Q. Did they at that time inspect the feed that you had left on hand?

A. I don't know if they ever got out of the car. They just drove out there and looked.

Q. Did they ask you how much feed you had left at that time?

A. No, they did not, sir. They just said the cattle wasn't doing any good and they were going to take them. That was it.

Q. Did they ask you what the status of your financial condition was at that time?

A. Not a word.

Q. Did they ask you whether you could afford to buy any more feed? A. No.

Q. As a matter of fact, had you purchased a substantial [73] amount of feed, in addition to that shown in the mortgage, during the course of that winter?

A. Yes, I had purchased a lot more.

Q. Would you state approximately how much more of each type of feed you purchased during that winter?

A. I bought 123 ton of ensilage and I bought 50 or so ton of hay and I bought 12-15 ton more of grain.

Q. That was in addition to what you had on hand at the beginning of the season?

A. That's right.

Q. Did you have further feed on hand at the time they took those cattle out?

A. I didn't hear you. It wasn't right on hand.

(Testimony of Clayton A. Butcher.)

I had the feed bargained for and I was hauling it every morning and feeding the cattle.

Q. And where were you hauling it from?

A. I was hauling it from Mr. Fritz, my neighbor right next to me.

Q. And had you purchased hay from him?

A. Yes.

Q. And will you state how much per ton you bought that hay for? A. $25.

Q. And regarding that hay owned by Mr. Fritz, will you state what, if anything, Mr. Yost asked you to do regarding [74] that hay after he brought his 100 head back or his 97?

A. He wanted to know if I could get him some hay, and I told him I didn't. The deal I had with Fritz, I was to use all his hay that I needed, and when I got through feeding he wanted the hay. The hay was hard to get. He said he would like to have a little left over. If I didn't need it, to leave it right there. So I didn't get no hay for anybody else.

Q. Did you take any other cattle for feeding following the Stringer and Yost cattle feeding?

A. I did, later in the season, yes.

Q. Whose did you take?

A. I took Pat Parker.

Q. Pardon? A. Pat Parker.

Q. And were those calves or were those heavy cattle? A. They was about half and half.

Q. And how many head were those?

A. Around 60.

(Testimony of Clayton A. Butcher.)

Q. 60 head? A. Yes.

Q. Did he furnish the feed to feed those with?

A. Yes.

Q. Mr. Parker did? A. Part of it. [75]

Q. Who furnished the other part?

A. I did.

Q. Did Mr. Yost or Mr. Stringer or anyone ever furnish you with any outbound weights?

A. No.

Q. As shown by scale tickets? A. No.

Q. Did Mr. Yost—did you ever ask Mr. Yost for those weights of the cattle?

A. I did. I asked him where the scale tickets was. He said, "I've got it. Here's the deal, right here, I have got it all right here on the paper."

Q. Now, speak up. Speak up.

Mr. Donart: I couldn't get that answer at all.

(Answer read back by reporter.)

Q. (By Mr. Shepard): Did he ever actually show you those scale tickets?

A. No. No, I never seen it.

Q. What did he show you?

A. He showed me some figures that he had added up there on a piece of paper.

Q. Has he or Mr. Stringer ever given you either the inbound weights or the outbound weights of those cattle on scale tickets?

A. No, not on scale tickets. [76]

Q. Did you ever agree with Mr. Yost as to the amount which was due you for feeding those cattle?

(Testimony of Clayton A. Butcher.)

A. No, I never agreed with him because I didn't know for sure.

Q. If you had known those 300 head of cattle were owned by Mr. Stringer instead of by Mr. Yost, would you have entered into that contract and signed that note and mortgage?

A. No, no, I wouldn't have.

Q. Why not?

A. Because I just wouldn't have done it.

Q. Speak up.

A. I said, no, I wouldn't have done it, because I——

The Court: He asked you why.

A. Why?

Q. (By Mr. Shepard): Yes.

A. Just because I never had any dealings with Mr. Stringer and I didn't want none.

Q. Now, what happened to the 97 head of Mr. Yost's cattle after he took them out?

A. He come and told me he wanted to know if he could bring them back to my place and use my yard. He said he could buy some hay, he thought, and feed them a few days. He had some place where he wanted to go with them, where I don't know. And I said, "Well, I guess you can."

So he said, "I will take them and have them weighed [77] and bring them back."

Q. Were those 97 head fed and pastured, both?

A. Yes, I think for a few days.

Q. How much work did these cattle require dur-

(Testimony of Clayton A. Butcher.)

ing the winter, was it an hour or so a day, or a full time job, or what?

A. It was a full time job, I know, for me.

Q. Approximately how many hours a day did you put in?

A. Well, I started in at daylight and worked way up to dark.

Q. And approximately how many days a week did you work in that fashion, four or five days a week? A. Seven.

Q. Was that again because the weather was so bad during that part of the winter?

A. What was that?

Q. Was that because the weather was bad, that they required more care as well as more feed?

A. Yes, because I had a lot of sick ones to doctor.

Mr. Donart: If it will shorten this, we will stipulate feeding that many cattle was a full time job for one man under any weather conditions.

Q. (By Mr. Shepard): What was the value of your labor per hour, would you estimate, Mr. Butcher?

A. Well, I imagine a dollar an hour is what they was getting. [78]

Q. Were you the only person who was working on these cattle?

A. No, I had extra help at different times.

Q. And what did you pay them, if anything?

A. I paid them a dollar an hour when they helped me.

(Testimony of Clayton A. Butcher.)

Q. And how much did you pay them altogether?

A. Between—right at $500.

Q. Did your two sons work with you?

A. On weekends they would help me grind feed and haul in hay to help through the week so I could get it in.

Q. Did you have to use any equipment?

A. Yes. I used tractors and trucks.

Q. And how many of each?

A. Well, I had three tractors there and two—one truck all the time and then I had another truck part time because I would get stuck so that I would have to have two trucks to get along.

Q. Would the reasonable rental of the tractor and loader be $1.50 an hour? A. Yes.

Q. And would the reasonable rental value of those trucks be at least $1 an hour?

A. Why, I think so. I don't think you could get one any cheaper than a dollar an hour.

Q. How many acres of land did you use for that feeding [79] program?

A. I used 200. Right at it. I had two hundred and some acres and the house and stuff out there, but it was around 200.

Q. What was the reasonable rental value of that land for that period of time?

Mr. Donart: Just a minute. That is objected to unless he shows for what purpose.

Mr. Shepard: For the purpose of feeding cattle.

The Court: With that amendment the question will be allowed.

(Testimony of Clayton A. Butcher.)

A. Well, what is that?

Q. (By Mr. Shepard): What was the reasonable rental value of that land for that period of time for feeding purposes?

A. Well, I would say—I don't know——

The Court: Speak up, speak up.

A. I imagine around three cents a day per head.

The Court: Three cents per day per head?

A. Yes. I don't think that would be out of line.

Mr. Shepard: That is all.

Cross Examination

Q. (By Mr. Donart): Now, on this feeding on the land, what ground did they feed on, was it agricultural land or what was it? [80]

A. What was that?

Q. What kind of ground were these stock fed upon, was it agricultural ground or what kind of ground?

A. Well, some of it was agricultural, and some was sandy and some was hilly.

Q. As a matter of fact, a landowner would generally be glad to have livestock fed on his land, wouldn't he, for the benefit the land get out of it?

A. Were you asking me that question?

Q. Yes, sir.

A. Well, they would if it wasn't wet and they trampled your alfalfa and stuff on the ground.

Q. Did you feed on the alfalfa?

A. I fed on it lots of times, yes.

Q. As regards this 460 tons of ensilage, 39 tons

(Testimony of Clayton A. Butcher.)

of corn, 30 tons of grain, 40 tons of straw and 90 tons of hay, was that all consumed in feeding these cattle? A. Yes.

Q. No part of it left then?

A. No. There might be 30 or 40 ton of ensilage left in the pit. There was some ensilage left in one pit. Whatever there was, it's still there.

Q. How's that?

A. I said there was a little ensilage left in one pit, and whatever there was is still left there, I never took it out. [81]

Q. There might be some ensilage left in that pit?

A. But there is not very much, 30, 40 ton, that would be the top of it.

Q. After being there this long would it have any value? A. No, it wouldn't.

Q. How's that?

A. It would be plumb rotten.

Q. Would it have any value? A. No.

Q. So if there is any of the mortgage chattels left, mortgage crop left, it, it has no value, is that right? A. That would be right.

Q. Now, you said you leased some land from Mrs. Morrow. Is that in addition to some land you own yourself?

A. I never said I leased any from Mrs. Morrow.

Q. Now, you said something, some of this land belongs to Mrs. Morrow. A. Yes.

Q. Is that correct? A. That's right.

(Testimony of Clayton A. Butcher.)

Q. Is that in addition to the 240 acres that I understood you to say that you own?

A. I never said I own any. I just run 240 acres.

Q. Oh. And whose land were you running?

A. I was running Mrs. Morrow's and Bob Caruthers. [82]

Q. Yes. Then was this mortgaged crop, 460 tons of ensilage, 39 of corn, and so forth, was that raised on Mrs. Morrow's land? A. Some of it.

Q. How much of it? A. I don't know.

Q. Can you give us an estimate of what portion of it?

A. Well, all the grain and the corn was.

Q. Any of the hay?

A. Yes, and the hay.

Q. The hay. How about the ensilage?

A. Well, the ensilage, some come off there and some the other place.

Q. In the Caruthers' place?

A. Down on the river, Caruthers' place.

Q. Would you estimate how much?

A. Well, there was—I cut two days on the Morrow land and we cut 46 loads of ensilage.

Q. 46 loads. And what did the average load weight? A. We figured around four ton.

Q. Then there would be nearly 200 tons of the ensilage raised on the Morrow ranch?

A. Yes.

Q. What was your arrangement with Mrs. Morrow? Under what arrangement were you operating that ranch? [83]

(Testimony of Clayton A. Butcher.)

A. She is my mother-in-law and she bought the ranch, and my wife and I just run it. She lets us have what we can get off it. [84]

Q. She just gave you what you can get off it?

A. That's right. We pay the taxes and she just lets us have what we make off the ranch.

Q. Now, you were talking about the fact that you were not out of feed, not out of money. Isn't that a fact that later in the month of March 1956 you went to Mr. Yost and tried to borrow $750 for the purpose of buying more feed—you went to his place in Nyssa?

A. I asked him if I could—That is, I don't know whether it's $700, I think it was $200 that I needed. I said until I could get around to make arrangements with my mother-in-law to get some more money. And he wouldn't let me have it. He said he didn't have it. I remember something to that effect. It was no $750. And I had to make a payment on some ensilage and I needed a little extra money and I asked him if he could let me have it for a few days and he said no.

Q. Now, isn't it a fact, Mr. Butcher, Mr. Yost after these cattle were removed went to your house with the scale ticket and you and Mr. Yost figured out the weight that they weighed and the weight they weighed out at?

A. No. He brought some — He didn't have no scale ticket, the weighed-in weight at all. I never did see them tickets. And where they are at I don't know. He had some figures there that he brought

(Testimony of Clayton A. Butcher.)

out and he said, "Here's the deal, right here."

Q. Do you want to tell the Court that you entered into a [85] contract of this magnitude where the profit, if any, that you would make off the deal depended upon what the cattle weighed when they were brought to your place and you never did ascertain what those weights were?

A. I asked him. He showed me but it wasn't the scale ticket. It was his own figures.

Q. But you never did ascertain what those weights were?

A. I did. I asked him what it was. He said, "Here they are, I copied them off and they are right here."

Q. He told you those were the weights and he had copied them off? A. Yes.

Q. Did you at that time dispute those weights?

A. Yes. I said, "Where's the scale ticket"?

He said, "Well, I've got them down there. I just forgot to bring them out."

I said that I would like to see them.

Q. All right. Did you ever go and follow that up and demand the right to see those scale tickets?

A. No, I didn't.

Mr. Shepard: I am going to object to that line of testimony if your Honor please as to whether he followed it up and demanded. He already stated that he requested.

The Witness: I already demanded.

The Court: Overruled. [86]

Q. (By Mr. Donart): Now, these 300 head of

(Testimony of Clayton A. Butcher.)

cattle from John Stringer, those were good cattle, weren't they? A. Yes.

Q. And they didn't eat any more hay because they belonged to John Stringer than they would have eaten if they belonged to Yost, did they?

A. Yes.

Q. They did? A. Yes.

Q. Because of Stringer's ownership, they eat more than they would if they had been Yost's cattle? A. No, it was the size of them.

Q. Well, you didn't object to the size of them when they were brought there to the place, did you?

A. Object to them? I would have if I hadn't been in that deal or had that note and contract signed, I would have objected to that. I would have put them on the trucks and sent them back on home.

Q. And did you make any objection to the size of those cattle when they were brought there to the place? A. No, I didn't.

Q. And if you had an objection, you would have had the same objection whether they belonged to John Stringer or whether they belonged to Yost, wouldn't you?

A. Well, if they had belonged to Yost I don't think they [87] would have been as full, that would have been the only thing.

Q. Well, wouldn't the size of them have been just as objectionable if they had been Yost's steers as if they had been Stringer's?

(Testimony of Clayton A. Butcher.)

A. I don't get it. I didn't hear part of that.

Q. You said you objected to the size of the steers?

A. I didn't say the size. I said the fullness of them. That is what I meant.

Q. Oh, the fullness of them. Well, they gave you 3 per cent shrinkage on them, didn't they?

A. They said they did. I don't know.

Q. Well, at that time wouldn't they have been just as full if they had belonged to Yost as if they had belonged to Stringer?

A. They wouldn't have if he had brought them out of Jordan Valley and weighed them at Nyssa like our agreement called for.

Mr. Donart: I move to strike that last answer as not responsive.

The Court: The motion is granted.

Mr. Donart: That is all, sir.

The Court: We will take a recess now until half past 1:00.

Mr. Shepard: If your Honor please, may I ask just one question and then I will close my redirect.

The Court: All right.

Redirect Examination

Q. (By Mr. Shepard): Did you ever have to replant any crops that were damaged by those cows? A. Did I what?

Q. Did you ever have to replant any crops that were trampled by those cattle?

A. Yes, some alfalfa.

(Testimony of Clayton A. Butcher.)

Mr. Donart: That is objected to as not material, not within the issues.

The Court: Overruled.

Mr. Shepard: That is all. [89]

Afternoon Session, 1:30 O'Clock P.M.

Mr. Shepard: If the Court please, request permission to recall Mr. Butcher for just a moment?

Redirect Examination—(Resumed)

Q. (By Mr. Shepard): You are the same Mr. Butcher who was sworn and testified?

A. I am.

Q. Mr. Butcher, were any cattle owned by Mr. Caruthers on your ranch during the same period of time that you were feeding the 400 belonging to Yost? A. There was.

Q. How many cattle? A. Fifty.

Q. Whom do they belong to?

A. They belong to Bob Caruthers.

Q. And were those cattle intermixed with the cattle belonging to Yost and Stringer?

A. No, they never was. I had them in a lot by themselves and they stayed there all winter.

Q. Speak up.

A. They were in a lot by themselves and they were never mixed up.

Q. There was a fence separating them? [90]

A. They were two-year-old steers and they were kept separate at all times.

Q. Was any of the feed covered by this mortgage fed to those steers of Caruthers?

A. No, not a bit.

(Testimony of Clayton A. Butcher.)

Mr. Shepard: Would you have these marked for identification, please?

(Whereupon checks were marked Defendant's Exhibit No. 7 for Identification.)

Mr. Shepard: Mr. Butcher, you stated in your prior testimony that you had purchased a substantial amount of feed, in addition to that already shown in the mortgage. The Bailiff has handed you what has been marked as Exhibit for Identification No. 7. Will you please state what that exhibit consists of?

A. These were cancelled checks that I bought extra feed to feed Jim Yost's cattle above what I had on hand.

Q. Those checks represent the amounts of money that you expended in purchasing feed in addition to that shown in the mortgage, is that correct?

A. That's correct. Some of them—There are some of them I haven't got.

Q. This only represents a part of it?

A. Only part of it.

Mr. Shepard: I move its admission into evidence. [91]

The Court: Very well.

Mr. Shepard: May we see the checks?

The Court: What do they total, Mr. Shepard?

Q. (By Mr. Shepard): Do you know what they total?

A. No, I never totaled them. I just sorted them out, the ones I paid for feed with.

(Testimony of Clayton A. Butcher.)

The Court: Do I understand your testimony, sir, you mean that this additional money that you spent was for the feeding of Yost's cattle?

A. Yes.

The Court: It was exclusively devoted to that?

A. Yes.

Q. (By Mr. Shepard): None of the money shown expended by these checks was used to feed or was used to purchase feed for the Caruthers' cattle?

A. Caruthers bought all of his own feed. I didn't have nothing to do with it other than to feed the cattle his feed.

Q. He bought all his own feed?

A. He bought all his own.

Mr. Donart: There is no objection to their admission.

The Court: All right. They may be received in evidence. But at some point here later in the afternoon I would like to have a total of those checks.

(Whereupon, Defendant's Exhibit No. 7 for Identification was received in evidence.) [92]

Q. (By Mr. Shepard): Mr. Butcher, if those cattle of Yost and Stringer had been permitted to remain in your place to the balance of the 150 days, would you have been able to put on substantial gains as far as weight was concerned?

A. Yes, I would have, because the weather was good then.

(Testimony of Clayton A. Butcher.)

Q. What do you mean the weather was good then?

A. Spring had broken, the weather was warm, the cattle was doing good. They would have put on more gain than any other time of the year is what I would say.

Mr. Shepard: That is all.

Mr. Donart: May I see those checks for the purpose of cross-examination?

The Court: Yes.

Recross Examination

Q. (By Mr. Donart): I noticed in these checks there is one dated January 30, 1956, $25 to Raymond Norlien—it is marked for corn? A. Yes.

Q. You started buying corn at that time?

A. When was that?

Q. January 30th.

A. I gave him a payment on some. I had already spoken for corn. He asked me to let him have a little money and I did.

Q. When was that corn delivered to you? [93]

A. I don't know. I ground it at different times of the year whenever I needed it.

Q. How is that?

A. I said I ground it. It was ear corn and I ground it whenever I needed it, whenever I had time, on Saturday or Sunday when I had my boys help me, we would go grind it—Some of the different places where I bought it.

Q. And I noticed one check for $50, February

(Testimony of Clayton A. Butcher.)

16, to Raymond Norlien for corn? A. Yes.

Q. Is that when corn was delivered?

A. No, that's just when I give him some money on it. Once in a while I would go up and get some corn and grind it, when I would have time, and whatever it weighed out I paid him for it.

Q. And who was D. R. Hartley?

A. He was a man over in Oregon.

Q. What? A. He was a man in Oregon.

Q. In Oregon? A. Yes.

Q. And Walter Johnson?

A. He lived in Idaho. He is a neighbor.

Q. And J. P. Lane?

A. He is my neighbor. He lives in Idaho. [94]

Q. I notice a check given to Hartley marked "hay $41.50," April 17th?

A. Well, I got some hay from him and that's when I paid him for it.

Q. Yes. Another one to Walter Johnson, April 28, '56? A. That's right.

Q. $150.?

A. That's right. I got hay from him.

Q. And Lane, April 27, $205?

A. That's right.

Q. Now, back as far as October 24th did you buy some feed from a man by the name of Daily?

A. Who?

Mr. Shepard: What year?

Mr. Donart: '55.

A. What was the name?

(Testimony of Clayton A. Butcher.)

Mr. Shepard: Well, it looks like Dilly but the l's are both crossed. It might be Ditty.

A. Ditty. I didn't buy hay, I bought corn ensilage.

Q. That was in October? A. Yes.

Q. And what did you buy from Albert Meier that you gave him a check for on October 5, 1955?

A. I bought corn ensilage.

Q. And what did you buy from Walter Johnson on October 8 [95] that you gave him a check for $50? A. I bought some hay.

Q. And there is a man—that looks like S. H. Roberts? A. That was hay.

Q. When did you buy—The check is given September 18, 1956?

A. That is when I was finished paying him for his hay.

Q. That's what?

A. That is when I finished paying him for his hay. I'd done some work for him. We hadn't got it straightened out. I helped him with some work on the ranch and we hadn't gotten straightened out and I owed him the balance of that on the feed.

Mr. Donart: I believe that is all, sir.

The Court: Now, if I understand your testimony correctly, all of these amounts, represented by those checks were paid for for feed which you fed to the Yost cattle, is that right?

A. That's correct.

The Court: Go ahead, counsel.

(Testimony of Clayton A. Butcher.)

Mr. Shepard: That's all we have of this witness.

(Witness excused.)

PAT PARKER

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: State your name and occupation for [96] the record.

A. Pat Parker.

Direct Examination

Q. (By Mr. Shepard): What is your occupation, Mr. Parker?

A. I live on a ranch and I feed cattle.

Q. Where is this ranch?

A. Four miles north-west of Nyssa, Oregon.

Q. And how long have you been connected with cattle?

A. The last 12 years, exclusively.

Q. Did you deal in or with cattle prior to that time?

A. Yes, mostly in milk cattle, milk stock.

Q. What particular type of dealing in cattle have you done in the last 12 years?

A. Well, I have got out and sold a lot and I fed probably an average of 800 cattle a year for the market.

Q. Have those been all types of cattle insofar as age is concerned? A. Yes, sir.

Q. You are acquainted with the defendant,

(Testimony of Pat Parker.)

Butcher, in this case? A. Yes, I am.

Q. Approximately how long have you known him? A. About 8 years.

Q. Would you consider yourself a friend of his? A. Yes, I would. [97]

Q. During the winter months of the years—— Strike that.

During the months of December, 1955, January, February and March, 1956, would you state what the weather was during those months?

A. Well, I would say it was very changeable and very muddy and——

Q. What effect would that particular type of weather have on a cattle feeding operation?

A. Well, it had a very bad effect on mine, the fact that they had to lay in mud, and it's hard for them to get their rest. Cold weather automatically takes more feed to produce the pound of gain on cattle, when it's cold.

Q. You were feeding cattle yourself that winter? A. Yes, I was.

Q. Approximately how many head were you feeding, Mr. Parker?

A. Well, through the winter months, I would say about 400.

Q. What was your experience, as far as being able to put any weight on those cattle, during those months up until March of '56, on the cattle which you were feeding?

A. Well, I had three or four distinctly different kinds of cattle. I had some cows I was

(Testimony of Pat Parker.)

feeding and some yearling heifers and weaner calves.

Q. What was your experience in putting weight on those [98] weaner calves during those months, Mr. Parker? Was it difficult or did they take weight easily?

A. Well, it was very hard to get any gain on those cattle through the worst period of the winter.

Q. And what was your experience in regard to weight gain after—Strike that.

I will ask it this way:

When did that changeable wintery weather end during the spring of 1956, approximately, as you can remember?

A. Well, I would say along the first of March, between the 1st and the 15th, possibly. I don't remember exactly.

Q. And what was your experience from the 15th of March on in being able to put weight gain on cattle, Mr. Parker, especially weaner calves?

A. Well, it's much easier when the weather is warm.

Q. Did you find that your calves gained substantially more during that period of time?

A. Yes, I did.

Q. Are you acquainted with the operation conducted by Mr. Butcher on his ranch?

A. Well, I fed cattle there one year myself and he has fed some for me.

Q. During the period of time, from the 1st of December, 1955 until the 1st of April, 1956, did

(Testimony of Pat Parker.)

you have occasion to see those cattle which Mr. Butcher was feeding on his place? [99]

A. I saw them twice.

Q. Approximately, when was the first time that you saw them, in time?

A. Well, I had some feeders and racks left there from the year before and I went and got those approximately the 10th of December.

Q. And will you state in what condition, in your opinion, those cattle were as you looked at them at that time?

A. Well, just an average stock condition, I would say, probably comparable to all the cattle at that time of the year in the country.

Q. All the cattle in that area?

A. That's right.

Q. What, if you know, was the condition of all the cattle in that particular area, Mr. Parker, during those months? A. Well—— [100]

Q. Those Winter months?

A. Well, up until December, I would say it was an average year, but from then on until Spring it was exceptionally rainy and muddy, and it would freeze up and thaw out. There were times when I had to have a team to feed my cattle with, I couldn't get through the roads with the truck.

Q. You couldn't get a truck in and feed them, is that correct? A. That's correct.

Q. What, if you know, was the experience with disease in cattle during those months of January

(Testimony of Pat Parker.)

and February of 1956 throughout the general area?

A. Well, my experience with weaner calves, shipping fever is always prevalent among them, and the worse the weather is the more you are going to have of it.

Q. Was there a lot of that fever around that year because the weather was so bad?

A. Yes, there was.

Q. What would you estimate would be the average loss per hundred head throughout the area by reason of cattle disease that particular Winter?

A. Well, I don't remember mine but in the all over picture I expect about a 3 per cent death loss from the time the calf is weaned until the time you turn him out the next Spring.

Q. That would be on an average?

A. An average, normal death loss. [101]

Q. Assuming, Mr. Parker, that a person fed 397 head during the winter season of weaner calves and only lost 1 calf, would you say that that was an extremely low death loss to sustain?

A. I would say it was exceptional.

Q. You stated that you observed the cattle in December. Did you then observe them again?

A. Yes. Approximately the 1st of March.

Q. The 1st of March of what year?

A. '56.

Q. And '56. And in what condition were they at that time, during the first of March?

(Testimony of Pat Parker.)

A. Well, I would say the average of all calves in that size range in that community.

Q. Were they starving to death? A. No.

Q. Were a lot of them down, next door to dying?

A. No. They seemed to be all pretty healthy, outside of maybe 30 or 40, I don't know how many there was, that he had under a shed there that he had been treating.

Q. What do you mean by treating, Mr. Parker?

A. Well, pneumonia and shipping fever. The cattle didn't feel quite up to par. The cattle, as I observed them, were in average wintering condition.

Q. Mr. Parker, state if you know what the market value of a ton of ensilage was in the period of time from December [102] of 1955 to April of 1956?

A. Well, I put in about 650 ton in the fall of 1955 and I gave $8.00 for it delivered into the pit.

Q. Do you have an opinion as to the value of hay during that period of time per ton?

A. Well, I believe I bought hay twice and I gave $25.00 for the first I bought, chopped and delivered at my feed lot, and the last hay I bought, I think there was about 80 ton of it, and I paid $27.00 for it chopped and delivered, stacked up in my feed racks.

Q. How about ear corn and grain, do you have an opinion as to the value of that per ton during that period of time?

(Testimony of Pat Parker.)

A. Well, I bought some corn in Apple Valley for $42.00 a ton. That was the end of the year. And all the barley I bought was processed with molasses in it ready for feeding and I gave $52 for that.

Q. Would you say $1.00 an hour would be a reasonable wage to pay ranch hands during that period of time, Mr. Parker?

A. No, I wouldn't.

Q. Would that be too low or too high?

A. Well, I would say that was about an average in the winter time, $1.00 to $1.25 an hour.

The Court: Speak up a little bit, Mr. Parker.

A. All right.

Mr. Shepard: You stated $1.00 to $1.25 an hour? [103] A. Per hour.

Q. Have you ever had occasion to rent any land for the purpose of feeding cattle over winter, Mr. Parker?

A. Well, the last winter, in '56 and '57, I fed all my cattle at Oregon Feeding Company in Ontario Oregon and this schedule called for $0.035 per day per head if you fed them. If you furnished the feed and they fed them, the rental was $0.07 per day for the rental and the feeding. The rental alone was $0.035 per day per head.

Q. Would you say $1.50 an hour would be an unreasonable rental valuation for a tractor and loader? A. No, I wouldn't.

Q. Would you say that $1.00 an hour would be an unreasonable sum for the rental of trucks?

(Testimony of Pat Parker.)

A. No, sir.

Mr. Shepard: I think that is all.

Cross Examination

Q. (By Mr. Donart): I understood you to say your cattle put on some weight after March, 1956, your weaners, in your feed lot?

A. That's right.

Q. About how much did they put on, in your estimation, per day?

A. Well, it has been my experience that one pound per day under good conditions is a very good gain for weaner calves. [104]

Q. Is that about what yours put on?

A. The entire winter, much more.

Q. What did they put on in March, after, as you said, the weather warmed up, in March?

A. Well, I think probably one pound and a quarter a day.

Q. Do you think they put on one pound and a quarter? A. Yes.

Q. Now, what were you feeding them?

A. Feeding grain, beet pulp, ensilage, and chopped hay.

Q. All right.

A. Some of those cattle I fed potatoes to them.

Q. Now, let's just assume you didn't have any beet pulp. Suppose you fed them on chopped hay, ensilage and grain, how much chopped hay per day would you have to feed to them, and how much ensilage and how much grain?

(Testimony of Pat Parker.)

A. Well, I have never kept very close track of that. I feed mine all they will eat, all of them except grain.

Q. Couldn't you estimate about what you fed to them? You're a cattle feeder of experience.

A. Well, I would estimate that a weaner calf in March, from then on until the time he went to grass, would probably eat 20, maybe 25 pounds of ensilage.

Q. 20 to 25 pounds of ensilage. How much hay?

A. Oh, between 5 and 10 pounds, probably 8 pounds. That is all governed by how much grain you give them. [105]

Q. All right. Where you were only feeding from 2 to 3 pounds of grain, that is all you fed to them, that much ensilage and that much hay, 2 to 3 pounds would be grain.

A. That would be about an average feeding for light cattle.

Q. Now, you said 20-25 pounds of hay, and that hay, I believe you said, costs at that time a minimum of $25.00?

A. I didn't say 20 or 25 pounds of hay.

Q. I beg your pardon. Ensilage.

A. That's right.

Q. And that was $8.00 a ton?

A. $8.00 a ton put in, and I think anybody will tell you that you have possibly a 15 per cent loss on your tops and bottoms, the mold that you have to throw away.

(Testimony of Pat Parker.)

Q. Yes. So it really costs you around $10.00 a ton? A. That's right.

Q. All right. Let's put it at $10.00 a ton. That is a half a cent a pound? A. That's right.

Q. Is it not? A. That's right.

Q. Then your ensilage cost per day would be from 10 to 12 and a half cents, would it not?

A. That's right.

Q. And 5 to 10 pounds of hay. Hay, according to your figure, was worth about a cent and a quarter a pound, wasn't it? [106]

A. Yes.

Q. And on 5 to 10 pounds would be about 8 or 9 cents a day, wouldn't it?

A. That would be about right.

Q. And your grain at that time was worth what? I thought you said $52.00.

A. $52.00 for mixed grain ready to feed.

Q. That would be about, at least, 2 and a half cents a pound, wouldn't it? A. Yes, sir.

Q. And it takes a minimum of 2 pounds. That would cost at least 5 cents, wouldn't it?

A. Yes.

Q. Is that right? A. That's right.

Q. Now, to feed 397 head of cattle, was that a job for one man or was that a two man job?

A. Well, it's possibly a man and a half job.

Q. All right. How many man hours per day?

A. Well, at the present time I am feeding about that many cattle and I have a hired man full time

(Testimony of Pat Parker.)

and I almost always help him till noon. I would say it required 12 man hours a day.

Q. You would say it would have taken at least 12 man hours a day?

A. That's right. No, that could be governed by the amount [107] of equipment and machinery you had. Some people have feed boxes and it doesn't require that much time.

Q. Well, you know the equipment that the defendant has, do you not? A. Yes, I do.

Q. I want you to express it in terms of that equipment, would it have taken about 12 man hours per day?

A. That is what it takes to feed mine.

Q. Well, is that what you estimated would have taken to feed under the conditions that the defendant was feeding under? Did he have more favorable or less favorable conditions than you had?

A. Well, he has a better loader than I have. I would say about comparable.

Q. The two of them are about comparable.

Now, how many man hours per day would you use the tractor?

9. Oh, that could be governed by how many times you have got stuck and how often you had to pull it out. But I would say an average of 3 or 4, maybe 4 hours a day.

Q. How many man hours a day for the truck?

A. Well, your truck is on the job all the time.

Q. Yes. It would take 12 man hours per day—It would take less than that, probably?

(Testimony of Pat Parker.)

A. Well, while you are loading your truck is sitting still. [108]

Q. I know, but when you hire a truck you pay for it whether it is sitting still or in motion, don't you?

A. Well, yes, I suppose. I never rented one.

Q. What I was getting at, you had 12 man hours but that was expended by 2 men.

A. That's right.

Q. And I believe you said one of them was working about half time? A. That's right.

Q. So would you say about 8 hours per day for the truck?

A. It would be on the job that much, yes, sir.

Q. All right. Then the labor in feeding, 12 man hours at $1.00, and say 3 hours to the tractor at $1.50, it would be $4.50, and 8 hours for the truck would be $8.00, would it not? A. Yes.

Q. That would be about $16.50 a day for labor, wouldn't it? A. Yes.

Q. And according to your figures, from 10 to 12 and a half cents for ensilage. Let's take the lower figure of 10.

9 cents for hay.

5 cents for grain.

There would be 24 cents per head per day for feeding? A. Yes.

Q. You figure you could put a pound and a quarter on, is that your estimate? [109]

A. I said that you could put on a pound and a

(Testimony of Pat Parker.)

quarter when the weather conditions and everything——

Q. That is what I mean, under good weather conditions, like you would have from March on, you could put on a pound and a quarter a day?

A. That's right.

Q. All right. Now, at 15 cents a pound, a pound and a quarter would bring a man between 18, 19 cents?

A. That would make it approximate, yes.

Q. And that would cost 24 cents for feed, plus $16.50 a day for labor and hiring equipment?

A. $16.50 per day on how many head?

Q. On the 400, on the whole group—397 head.

I think that is all.

Redirect Examination

Q. (By Mr. Shepard): Mr. Parker, Mr. Donart asked you about this, that you might expect a pound and a quarter gain, isn't that correct, per day?

A. Yes, sir, under all favorable conditions, providing everything was—the weather, was warm——

Q. That would be for the entire term, it would be an average daily increase for the term of 150 days, is that correct? A. No.

Mr. Donart: That is objected to as leading and [110] suggestive and not in accordance with the witness' former testimony.

The Court: Change the form of the question Mr. Shepard.

Q. (By Mr. Shepard): If you weighed the cat-

(Testimony of Pat Parker.)

tle at the beginning of the month of February in 1956 and then weighed them at the end of the month of February of 1956, in your opinion would there be a pound and a quarter gain during that period?

A. No, I don't think there would. The weather doesn't permit that kind of a gain during a cold winter month.

Q. Mr. Parker, assuming that those calves had been delivered—those 400 head of calves, had been delivered to Mr. Butcher's place right out of a feeding yard and had been transported across approximately 4 miles to his ranch and had been stuffed full of feed and water immediately prior to their leaving the lot, would you have an opinion as to how long it would take to get that weight back again?

Mr. Donart: That is objected to as being entirely outside the issues of this case.

The Court: The objection is sustained.

Mr. Shepard: That is all.

Mr. Donart: That is all.

The Court: I am handing to the Clerk what has been admitted in evidence as Defendant's Exhibit No. 7, consisting of a series of checks. My rough calculations indicate that they [111] indicate a sum of $2,551.70. That is subject to correction.

(Witness excused.)

ALBERTA GRACE MORROW

called as a witness on her own behalf, being first duly sworn, thereupon testified as follows:

The Clerk: State your name for the record.

A. Alberta Grace Morrow.

Direct Examination

Q. (By Mr. Shepard): Mrs. Morrow, where do you reside, ma'am?

A. Well, my address is Cottonwood, Idaho.

Q. And approximately how far is that from Perma, Idaho? A. Well——

Q. About 200 miles, roughly?

A. Well, it's a little further than that, I think. I wouldn't be positive.

Q. And that is north of here? A. Yes.

Q. And you reside and operate a cattle ranch in that area, is that correct?

A. Yes, about 25 miles from Cottonwood.

Q. And approximately how many acres do you operate in that area? A. 18,600.

Q. 18,600 acres. Will you describe very briefly the type [112] of country this is, is it very remote country from any town or city of any size at all?

A. Yes, it is. It is pretty much isolated.

Q. Is your ranch largely divided into two areas, a summer range and a winter range? A. Yes.

Q. And is your winter range even more remote than your summer range? A. Yes, it is.

Q. Is it difficult to get to?

A. It is isolated completely, with the exception of——

(Testimony of Alberta Grace Morrow.)

Q. What is your method of transportation in and out of that winter range during the winter?

A. I didn't understand the first part.

Q. What is the only way you can get in and out of that winter range during the winter?

A. Well, you can go in and out by horseback until the snow gets too deep on the mountain. Then you have to travel by boat, if the river isn't froze up.

Q. In other words, you come up the Snake River from the City of Lewiston to get to your ranch?

A. Yes.

Q. If the river isn't frozen?

A. When it isn't.

Q. How often during the month of December of 1956 and [113] January, February and March—I beg your pardon, December 1955 and January, February and March of 1956, did you get out from your ranch?

A. Well, I most generally try to spend Christmas with the girls here in Parma.

Q. At Parma? A. Yes.

Q. Did you that year? A. Yes.

Q. How many days, approximately—. When you say "the girls," you mean Mrs. Butcher?

A. Yes.

Q. At Parma?

A. And Dolores, the boys.

Q. And Mrs. Butcher is the wife of Clayton Butcher, the defendant in this case? A. Yes.

(Testimony of Alberta Grace Morrow.)

Q. You did spend that winter with them? I mean, that Christmas with them?

A. Yes, sir, for about three days, I think.

Q. And where did you spend all the rest of the time during that winter?

A. On my ranch.

Q. And how many people operate that ranch, Mrs. Morrow? A. Myself and one hired man.

Q. You and your hired man?

The Court: I didn't hear you, Mrs. Morrow, and what?

A. Myself and one hired man.

Q. (By Mr. Shepard): And approximately how many head of cattle do you run up there?

A. Between 700 and 800.

Q. And that is a full time job for you and this one hired man? A. Full time.

Q. Mrs. Morrow, had you ever met Mr. Yost prior to your signing this note and mortgage?

A. One time, at Ontario.

Q. I can't hear you.

A. One time, at Ontario, Oregon.

Q. And when was that, approximately?

A. Well, it was quite a while before this.

Q. Well, how long, do you mean a matter of six months prior to signing?

A. Oh, it was two or three years before.

Q. Two or three years. You had no conversation at that time about signing any note?

A. Well, I scarcely knew him.

Q. I beg your pardon?

(Testimony of Alberta Grace Morrow.)

A. I scarcely knew him at all. [115]

Q. Did you talk to him at the time you signed this note at all? A. No.

Q. Will you state where, if you know, you actually signed this note?

A. Down at Nyssa.

The Court: Where?

Mr. Shepard: Where. Speak up so we can hear you.

A. At Nyssa.

The Court: Nyssa?

A. Yes.

Q. (By Mr. Shepard): And was that at Mr. Henigson's office, the lawyer down there?

A. It was an attorney. I just don't know who, what his name was.

Q. Was that lawyer there at the time you signed? A. Yes.

Q. Had you ever hired him as a lawyer?

A. No.

Q. He didn't represent you?

A. No. In no way.

(Handing the witness the Exhibit No. 2.)

Q. (By Mr. Shepard): Now, Mrs. Morrow, on that is your signature that appears, on that mortgage, is that correct?

A. I will have to get my glasses. [116]

Mr. Donart: That is objected to. They admit the execution of the note and the mortgage.

The Court: You admit it in the Answer?

(Testimony of Alberta Grace Morrow.)

Mr. Shepard: Yes. I expect her answer to be that she did that, it is her signature.

The Court: It is of no consequence. Let her identify the signature.

Mr. Shepard: I am merely trying to familiarize the witness with that exhibit.

May I approach the witness?

The Court: Yes.

Q. (By Mr. Shepard): That is your signature that appears on that document? A. Yes, it is.

Q. Did you read that instrument prior to the time that you signed it, Mrs. Morrow?

A. No, I didn't.

Q. Did the lawyer merely point out where he wanted you to sign and you signed it, is that correct? A. Yes.

Q. Did you have any conversation with that lawyer at that time as to whether or not you owned any of that feed?

Mr. Donart: That is objected to as not being within the issues.

The Court: Sustained. [117]

Let me ask this question, did you know anything about this transaction at all?

A. No, I didn't.

The Court: Did anybody explain to you why you were being asked to sign that mortgage?

A. Well, on account of I owned the property where it was raised.

The Court: That was the only purpose?

A. That was the only purpose.

(Testimony of Alberta Grace Morrow.)

The Court: The only purpose in having you sign it?

A. Yes, it was.

The Court: They told you. Now, you own the property, and, in order to protect ourselves in the event you should decide to run us off the land, we would like your signature on it?

A. Right.

The Court: Is that right?

A. That's right.

Q. (By Mr. Shepard): Did you ever receive any money from Mr. Yost on this? A. No.

Mr. Donart: That is objected to as being immaterial.

The Court: Overruled. The answer is "no."

Q. (By Mr. Shepard): Did you have any interest in the feed and which was the subject of that mortgage? [118] A. No, I did not.

Q. Did Mr. Butcher have any interest in any feed that was on your property at your other ranch? A. No, I didn't.

Q. Did he have any interest or any title in any of the cattle that you ran on your ranch?

A. No.

Q. Did you have any interest in any of the cattle that might be running on his ranch?

A. No.

Q. Did you sign any agreement with Mr. Yost about feeding any cattle? A. I did not.

Q. Did you talk to Mr. Yost about any agreement for cattle feeding? A. No.

(Testimony of Alberta Grace Morrow.)

Mr. Shepard: That is all.

Mr. Donart: That is all.

(Witness excused.)

ALBERT MEIER

called as a witness on behalf of the defendants, being first duly sworn, thereupon testified as follows:

The Clerk: State your name and occupation for the record.

A. Albert Meier, I am a farmer. [119]

Direct Examination

Q. (By Mr. Shepard): Where do you reside, Mr. Meier?

A. I live at Parma, Idaho, or near Parma, on a ranch.

Q. Where do you reside in relationship to Mr. Butcher's ranch?

A. Approximately one mile from him.

Q. You are neighbors, so to speak?

A. Yes.

Q. You are acquainted with Mr. Butcher?

A. Yes.

Q. How long have you resided at your ranch up there? A. Probably 15 years.

Q. You have known Mr. Butcher considerably during that time?

A. Yes, in the last six years, possibly.

Q. During the year or during the month of December 1955 to January, February and March of

(Testimony of Albert Meier.)

1956 will you state what agreement you had if any with Mr. Butcher to furnish him hay?

A. Well, I never furnished Mr. Butcher any hay.

Q. Ensilage. I beg your pardon.

A. Well, in the fall of——

Q. Speak up, Mr. Meier, it's hard for us to hear.

A. In the fall of 1955 I had 30 acres of corn growing on some land that I had rented from Mr. Butcher and I made an [120] agreement with him to sell it to him and put it in the pit as ensilage.

Q. I can't hear you, Mr. Meier, you're going to have to speak louder.

A. Well, during the summer of 1955 I had 30 acres of corn growing. I made an agreement with Mr. Butcher to place this as ensilage in his pits.

Q. Was that ensilage so placed in his pit?

A. Yes.

Q. When did that take place?

A. It would be in September.

Q. Do you know how much was placed there, by tonnage? A. 472 ton.

Q. 472 ton? A. Yes.

Mr. Shepard: That is all.

Mr. Donart: That is all.

(Witness excused)

Mr. Shepard: The defendant will rest, if your Honor please.

The defendant Morrow will renew her Motion, as stated to the Court prior to this time.

The Court: Do you wish to be heard on the Motion with respect to Mrs. Morrow?

Mr. Donart: Our position is her signature appears [121] on the note and the mortgage. Why she signed that doesn't effect her liability. She doesn't complain that she was defrauded. She says Yost never talked to her in his life.

The Court: Motion to Dismiss as to Mrs. Morrow is granted.

Any rebuttal, Mr. Donart?

Mr. Donart: Yes, I think we have some rebuttal.

(Short recess taken.)

(Whereupon, documents marked for identification, respectively, Plaintiff's Exhibits 8 and 9.)

The Court: Have you had an opportunity to see these exhibits?

Mr. Shepard: No, your Honor. I don't want to unnecessarily delay the Court but I think we are getting into an area of specific and precise weights, and, as I stated to the Court, I have never seen these before. Before I would be able to make any intelligent objections on them, I would like to advise your Honor it would take at least the ability to examine them some little time as to these specific weights. Now, if he wants to preliminarily examine this witness as to what these are, where he got them, what they purport to be, it would be all right at this time, but to go on to the specific weights shown here, I would like a little extra time at this point.

The Court: The witness, the plaintiff, Mr. Yost, can examine them preliminarily. I won't admit them into evidence [122] until you have had an opportunity to voice an objection.

JAMES R. YOST

called as a witness, in rebuttal, in his own behalf, having been previously duly sworn, thereupon testified as follows:

(Whereupon, documents marked for identification, respectively, Plaintiff's Exhibits 10, 11, and 12.)

Direct Examination

Q. (By Mr. Donart): Mr. Yost, you have been handed exhibits marked Plaintiff's Nos. 8, 9, 10, 11 and 12. Will you take them each by number and tell the Court what each one of them is?

Mr. Shepard: I am going to object to that procedure, if your Honor please. We are here in a very narrow area. No, as to what they are, he's going to have to establish, if he knows, to my satisfaction at least, if the Court please.

The Court: Well, do you know what those exhibits that you hold in your hand are?

A. Yes, sir, I do.

The Court: He can describe what they are. I am not going to make any fuss about that. Subject to your objection, of course, as to their admission.

Mr. Shepard: All right, your Honor.

Mr. Donart: Tell us what they are?

A. This is Exhibit No. 8. It is a complete record

(Testimony of James R. Yost.)

of the weights of the cattle that was weighed. [123]

Mr. Shepard: I am going to object unless some foundation is layed to show that he weighed the cattle and those are his figures on them. We are getting into hearsay.

The Court: Did you weigh the cattle yourself?

A. No, sir. They were weighed by the Nyssa Elevator, and they are signed by the people who operate that, disinterested parties.

The Court: Were you present when they were weighed?

A. No, sir, none of us were. They were weighed by a disinterested party at this establishment.

The Court: Why didn't you ever give those weights to Mr. Butcher?

A. These were given to Mr. Butcher. I took these weights to his house, and I have here a ribbon from Mr. Butcher's adding machine, that she totaled the weights on these cattle.

The Court: The objection is overruled.

Q. (By Mr. Donart): All right, what are the other exhibits?

The Court: Go ahead.

A. Can I proceed?

The Court: Yes.

A. These weights here listed on Exhibit No. 9 are the total weights out of the Butcher feed lot. These were also taken to the Butcher's residence, totaled by Mrs. Grace Butcher, Clayton Butcher and myself at the time the deal was completed.

(Testimony of James R. Yost.)

These weights show the difference between the weigh-in and the weigh-out of these cattle.

Q. (By Mr. Donart): Don't tell what it is. Just what are the other exhibits, you have got 8 or 9 now.

A. Exhibit 11 is a ribbon from the typewriter of the total number of weigh-in.

Q. And who made that exhibit 11, what typewriter or what ribbon?

A. It was made on Grace Butcher's adding machine.

This is Exhibit 10, is the slips from the sale yard of the purchase of these cattle that I bought that went to the Butcher feed lot.

Q. What is the next exhibit?

A. I didn't hear you George.

Q. What is the last exhibit?

A. This is Exhibit 12. This is also a total of the weigh-in of the Stringer cattle as they was weighed at the Nyssa Elevator.

Q. Do you have the total weigh-out of your cattle?

A. The total weigh-out of my cattle?

Q. Yes. A. Yes.

Q. Does the exhibit you have show all of your cattle, the 97 head, the 96 that belonged to you, or is there something missing from that? [125]

A. There is 20 head of these cattle that I did not find the slip from the sale yard for.

Q. You didn't find when?

A. Yesterday when I looked for them. I had the

(Testimony of James R. Yost.)

slips at the time that these slips were taken to Butcher when they were weighed in but sometime during the summer I misplaced them. I went to the sale yard to get another copy of the 20 head of steers and I couldn't find them, but this recording of weights here is the weight that I had recorded in my books that I kept this account in.

Q. Now, we understand you to say that you took a complete set of steer weights to Mr. Butcher's house? A. Yes, that's right.

Q. When was that, with respect to the time when the cattle were taken off the feed yard?

A. I can't tell you the exact date. The last of the cattle were removed the 4th and 9th. It would be March the 9th. No, it was within two to three days after these cattle were removed.

Q. And at that time state whether or not Mr. Butcher and you had a discussion as to whether those were the correct weights, the amount of gain and the amount on all of the cattle——

A. Mr. Butcher——?

Q. No, did you have such a discussion?

A. Yes, we did.

Q. All right. Now, tell us what was said between you and [126] Mr. Butcher?

A. After these weigh-out receipts were totaled we arrived at the figure that was due me from the loan that I had made Mr. Butcher. He informed me that he could not pay it but that he would go and call on Mrs. Morrow and see if we could per-

(Testimony of James R. Yost.)
suade to pay the unpaid balance of this, the amount of money due me from my loan.

Q. Did you make a memorandum at that time as to the amount due you and the offset against it?

A. Yes, I did.

Mr. Donart: Mr. Bailiff, will you hand this to the witness?

The Court: What is it?

Mr. Donart: I doubt if it is admissible as an exhibit. It is a memorandum that he made. I was going to ask him to use it to refresh his recollection from.

The Court: He may do that.

(Witness examining.)

Q. (By Mr. Donart): Do you have before you the memorandum? A. I do.

Q. Was that made while the material set forth there was fresh in your memory?

A. This was made immediately after the settlement with Mr. Butcher on the weights.

Q. All right. What does the memorandum show?

A. It shows 396 head of weaners, the total weight of 161,080 pounds into the feed lot in November. It shows 396 head of weaners, weighed 166,940 pounds weighed out in April.

That makes a total of 5,860 total gain of cattle on the feed lot with the 3 per cent shrinkage.

Mr. Butcher earned a total of 879 pounds (sic) on his contract.

Q. You mean pounds or dollars?

A. Dollars. Beg your pardon. At 15 cents a

(Testimony of James R. Yost.)

pound, 5,860 pounds, he earned $879 on his loan. And the $163 for pasture makes a credit on his loan for $1,042, leaving a total due me of $6,258 at 6 per cent interest.

The Court: How much is that again?

A. The last figure, your Honor?

The Court: Yes.

A. $6,258.

The Court: Plus interest?

A. Plus the 6 per cent interest.

Mr. Donart: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Shepard): Mr. Yost, how much poundage does that represent again, do you claim?

A. Well——

Q. Do you have the figures there? [128]

A. I have the figures.

Q. What does that represent, how many pounds?

A. It would represent a total of 14 pounds over the entire feeding. Per head of the 128 days. It would represent 14 pounds per head, gain, not per day, but for the 128 days.

Q. When you put those cattle in there did you agree with Mr. Butcher as to the ration that was to be fed those cattle?

Mr. Donart: That is objected to as not proper cross examination.

The Court: Do you wish to be heard on that, Mr. Shepard?

Mr. Shepard: I think it can be tied up. After

(Testimony of James R. Yost.)

all, here, I think, we are into a very broad speculative atmosphere as to the weight that was gained. That has been the testimony. I think I am entitled to test how he gets to it.

The Court: I will allow it.

Q. (By Mr. Shepard): Did you agree with Mr. Butcher as to the ration that was to be fed those cattle during that 158 day period in writing?

A. Those cattle were turned over——

Q. Just answer the question, did you or didn't you, Mr. Yost?

A. Those cattle were in Mr. Butcher's possession.

Q. Did you agree in writing as to the ration that was to be fed them? [129]

A. In his contract, yes.

Q. And you assumed that that would be correct to feed those cattle through the winter, is that correct? A. That's right.

Q. Is that correct?

A. That's right. Yes.

Q. And did you state that this was not an abnormal winter?

A. I would say it was an average winter that we had.

Q. It was an average winter?

A. I would say so, yes.

Q. What did you state that cattle would gain per day, in your opinion?

A. They should gain on that ration, they should gain a pound per day.

(Testimony of James R. Yost.)

Q. A pound per day. They should gain a pound per day.

How long were those cattle in there?

A. They were in there 128 days.

Q. 128 days? A. Yes.

Q. And that was all of them or just steers?

A. All of them.

Q. So theoretically they should have gained a 128 pounds? A. That's right.

Q. At least? A. That's right. [130]

Q. You state in your Answer to the cross-complaint that the reason that you took those cattle out of there was he had exhausted all that feed?

A. That's right.

Q. So he had obviously fed them their ration during that 128 days, is that correct?

A. That's correct.

Q. And yet instead of gaining 128 pounds, the way you would expect them to, they only gained 14, even though they were fed that much, is that correct?

A. I have no way of knowing how much they were fed.

Q. Well, the feed was all gone, wasn't it? That is what you said in your Cross-Complaint.

A. That's right, the feed was all gone. But there was other cattle there too, that could be—to be fed.

Q. Do you know whether any of that feed was fed to those other cattle?

A. I saw him take ensilage out of the same pit that he was feeding my cattle out of, yes.

(Testimony of James R. Yost.)

Q. Theoretically, those cattle should have a gain of 128 pounds? A. That's right.

Q. And they only gained 14 a head?

A. That's right.

Mr. Shepard: May I examine those exhibits?

The Court: You may.

Mr. Shepard: If your Honor please, to save a little time, could I approach the witness and examine him on these?

The Court: Yes.

Q. (By Mr. Shepard): Handing you that which has been marked Plaintiff's Exhibit 9.

Did you state that those were in-bound or out-bound weights?

A. These are out-bound weights.

Q. And where did you get those?

A. I got these from the Nyssa Elevator. You see their name on top of there. And they are also signed by the fellow that worked in the office in this business.

Q. I note on here, there is stamped on here "gross" weight or the terms "gross" and "tare."

A. That's right.

Q. If you know, what does the "gross" refer to there?

A. The "gross" is the total weight of the cattle and the truck.

Q. And the "tare"?

A. The "tare" is the truck that is weighed back —that is subtracted from the gross weight.

Q. Tell me again, I keep getting confused here,

(Testimony of James R. Yost.)

Mr. Yost, as to in-bound or out-bound. This exhibit——

A. This exhibit is of out-bound weights. [132]

Q. Out-bound weights? A. That's right.

Q. Now, to weigh these cattle correctly out-bound, what procedure should be gone through?

A. I don't quite understand your question as to the procedure.

Q. The correct procedure to go through in weighing out cattle like these, would be to load, or, rather, to weigh a truck empty, load it with cattle, and then weigh it again, is that correct?

A. That's right. Yes, that is customary.

Q. And then before you load it with cattle again you should weigh it empty again, shouldn't you?

A. That's right.

Q. Why is that?

A. To determine the weight of your truck back for your other load.

Q. In other words, the truck can vary a great deal between one loan and another, can it not?

A. That's right.

Q. How much could it vary?

A. I wouldn't know.

Q. Could it vary 7500 pounds?

A. Well, I wouldn't want to say, I don't know. I don't know how much your variation would be on your truck. [133]

The Court: I can't hear you.

A. I don't know what the variation would be on the weight.

(Testimony of James R. Yost.)

Q. (By Mr. Shepard): Let's assume you had 12,000 pounds of cattle in the truck and then you weighed the truck back, would it be unusual to find a 7500 pound differential in the truck?

A. I wouldn't know.

Q. It would be pretty ridiculous, wouldn't it? The only difference in that weight could be the manure that the cattle left in the truck, couldn't it?

A. Well, that's right. Whatever they would shrink or whatever they would leave in the truck.

Q. Now, were all these hauled by the same truck?

A. They were hauled back by the same truck and they were weighed in and out under the same conditions, over the same scales, and weighed by the same people.

Q. Insofar as you know?

A. Insofar as I know.

Q. You weren't there?

A. I wasn't there. We have the same signatures on the tickets.

Q. Do I understand you to say—I don't believe I understood you correctly, you don't mean that these tickets here represent the same truck going over those scales time and time again? There are a number of trucks represented here. [134]

A. That's right, they are not the same trucks but they are the same fleet of trucks.

Q. And the trucks wouldn't weigh the same, would they?

A. I think the trucks would weigh the same.

(Testimony of James R. Yost.)

Q. Do you know what make they were? Do you know what make they were? A. No, I don't.

Q. Do you know anything about the weights of the trucks? A. No.

Q. So far as you know, they might or might not weigh the same? A. Well, I suppose so.

The Court: What is your answer?

A. He wanted to know the difference in the weights.

The Court: No, that's not his question.

(Record read by Reporter.)

A. I don't know what the variation would be on the trucks.

Mr. Shepard: If your Honor please, I am going to object to the admission of or consideration in any way of this particular Exhibit 9 for the sole reason it has not been sufficiently—sufficient foundation has not been laid to show what they are. I think I should be entitled to enquire as to the various trucks that were used, how they were weighed and this weight differential, and there is no way I can learn that from examining this witness at all, if your Honor please. [135]

The Court: That is your problem, sir.

Mr. Shepard: I will object to their admission in this instance on that ground.

Mr. Donart: The exhibits were offered——

Mr. Shepard: I would like to continue on with some of these.

Mr. Donart: Well, I understood that the Court was——

(Testimony of James R. Yost.)

The Court: I want to hear from Mr. Donart on this last objection, briefly.

Mr. Shepard: Oh, I see.

Mr. Donart: These exhibits were taken to the defendant and, with the aid of those exhibits, they agreed upon what the in and out-bound weights were, and the amount of money that was due. The witness testified that this was run up on the defendant's own adding machine.

The Court: The objection is overruled. They will be received in evidence.

(Whereupon, Plaintiff's Exhibits Nos. 8, 9, 10, 11 and 12 for identification were received in evidence.)

Mr. Donart: I might say that there is a patent error in one of those scale weights. It shows an error of subtraction, but it is 4,000 pounds in the defendant's favor.

Mr. Shepard: Are there any other errors in the exhibit, as far as you know, Mr. Donart?

Mr. Donart: I just found that one. It was pointed [136] out to me. But we agreed on it so we are not trying to renege on it now.

Mr. Shepard: If your Honor please, I am going to request that we be granted a brief recess, for at least 15 minutes to examine these, and see if we can determine errors.

The Court: All right.

Mr. Shepard: We haven't seen them before.

The Court: You will have 15 minutes to examine them.

(Testimony of James R. Yost.)

(Short recess taken.)

Cross Examination—(Resumed)

Q. (By Mr. Shepard): Mr. Yost—may I approach the witness, your Honor?

The Court: Yes.

Mr. Shepard: Did you state that Plaintiff's Exhibit No. 9 represented the out-bound or the in-bound weights? A. This is the out-bound.

Q. That is the out-bound? A. Yes.

Q. Now, calling your attention to the first three slips in said pad, will you state what those three slips represent as far as whose cattle were being hauled? A. You mean the name?

Q. I will change it. Strike that.

Your cattle were being hauled out-bound all by one truck [137] in three different loads, is that correct? A. That's right.

Q. Who did the hauling.

A. A man by the name of Kenneth Maze.

Q. And he used the same truck?

A. Yes, sir, he did.

Q. And those first three tickets represent the load of your cattle that went out?

A. That's right, yes.

Q. As distinguished from Mr. Stringer's cattle?

A. That's right.

Q. And if the same truck was used, the weights of that truck for those three trips should be relatively the same, should they not?

A. Well, they would vary some.

(Testimony of James R. Yost.)

Q. How much would they vary?

A. I don't know. I couldn't say.

Q. Well, you have been in the cattle business for 5 years and you have some opinion. You shipped some cattle, haven't you?

A. Well, the reason I can't say is because it depends upon how heavy the cattle—how soon they have been fed and the weights of the cattle can vary as to the weight that would be in the truck.

Q. Do you think the 12,000 pounds of cattle could cast [138] 7500 pounds worth of manure?

A. Well, I wouldn't know.

Q. Do you think it is possible?

A. I don't know.

Q. They would have to be pretty healthy cattle to do that, wouldn't they? A. I don't know.

Q. Do you think those cattle, which you thought were in such terrible shape when you pulled them out of there, could have cast 7500 pounds worth of manure?

A. I wouldn't know how much they would shrink, I don't know.

Q. They were starving, according to you, weren't they? A. I don't know.

Q. You don't know whether they were starving or not?

A. I didn't say they were starving. I said that they were in poor shape.

Q. They were so close to starving they were eating sand, weren't they, according to you?

A. That's right.

(Testimony of James R. Yost.)

Q. All right. How much manure would they probably lose in being trucked?

A. I wouldn't know.

Q. You wouldn't know?

A. No. I don't know how much they would lose.

Q. Now, do the tare weights on the truck for those three [139] slips show a 7500 pound differential in the tare weight of that one truck? Will you examine that exhibit and find out, please?

A. You are speaking about my cattle, are you?

Q. Those three slips which represent the shipping of your cattle.

A. This is the weight of the truck the entire truck and all.

Q. The tare weight?

A. The 75,000 you are talking about is the entire weight with the manure and everything in there? Isn't it?

Q. All right, let me have the exhibit, please.

A. You see, this is the entire weight of the truck.

Q. Now, referring to the slip which is marked 14324, what is the tare weight on that?

A. That is the tare weight.

Q. What is the number?

A. 21,000, that is the gross weight of the truck.

Q. The tare weight is the gross weight?

A. Of the truck.

Q. Of the truck without any load in it?

A. That's right.

Q. And referring to the slip which is numbered

(Testimony of James R. Yost.)

14318, what is the tare weight of the truck as shown on that slip? A. 20,800.

Q. 20,800? [140]

A. Yes.

Q. So that those two are substantially the same, are they not, 21,000 and 21,800—they are roughly in the same area?

A. This would represent part of the same truck.

Q. That would represent the same truck being weighed at different times, would it not?

A. That's right.

Q. Now, this slip that was marked 14322, that would also represent the same truck weighed at a different time? A. Not necessarily.

Q. Would it not?

A. You see, some of these trucks were semis, some of them were truck and trailers, and some of them were the short wheel base truck.

Q. Now, you just got through saying all of your cattle were shipped in the same truck, driven by the same man, Mr. Maze. Do you want to change that?

A. No, I meant they were shipped by the same fleet of trucks. It doesn't necessarily mean it is just one particular truck, because they all couldn't have been hauled in one truck in a month.

Q. Did this one truck driven by Mr. Maze make three different trips and pickup all of your cattle over those three trips? A. Let me see that.

Q. No, just state whether you know or not?

A. Well, I don't exactly know whether he used

(Testimony of James R. Yost.)

more than one truck or not, because he has got more than one truck. Now, it could have been one or two trucks.

Q. What is the tare weight of the truck as shown on that third slip we were referring to?

A. Well, we have one for 21,000, we have one for 28,430.

Q. No, what was that again? A. 28,430.

Q. All right.

A. And we have one for 20,800.

Q. Going to Plaintiff's Exhibit No. 10, Mr. Yost, would you tell me again what that is supposed—what supposedly consists of?

A. This consists of one bunch of cattle that was weighed.

Q. Out-bound or in-bound?

A. This is in-bound. These are all in-bound weights, all of them.

Q. And these were supposedly weights which were recorded by this livestock commission company?

A. That's right, that's the buying weights of those cattle.

Q. How many cattle does that cover?

A. This covers 97 head. This doesn't cover the complete 97 head. We are less the 20 head that I couldn't find the sale records on, which weighed 6,970. [142]

Q. Now, if you can't find the sales weights on those how do you know they weighed 6,970?

A. Because this figure was recorded in by books

(Testimony of James R. Yost.)

off of this very same kind of sales slip here you are looking at at the time I bought the cattle.

Q. What are these two small white slips attached? A. Those are scale weights.

Q. Off what scale?

A. Off the Nyssa scales at the Union Livestock Commission Company.

Q. At the Nyssa scales? A. That's right.

Q. Now, they do not carry the notation "Nyssa scales" on them, do they?

A. No, they don't, but that is where they are from.

Q. And there is no signature on those?

A. No.

Q. To indicate who made those?

A. No, there isn't. Probably was weighed by a truck driver that unloaded them and weighed them back.

Q. Again, referring to Plaintiff's Exhibit No. 10, and the two white slips that you have attached, is that your handwriting? A. Yes, sir, it is.

Q. So they were made by you?

A. No, they weren't made by me. [143]

Q. But they are in your handwriting. Now, all of these adding machine tapes, these were made by Mrs. Butcher when you went up there and talked?

A. I didn't say all of them. I said the inbound one, that 131,000, was made by Mrs. Butcher's adding machine.

Q. What date was that?

(Testimony of James R. Yost.)

A. I can't tell you the exact date.

Q. What room in the house was that tabulation made in?

A. That was made in the living room.

Q. In their dining room on what kind of an adding machine, what make of adding machine was it? A. I don't know.

Mr. Shepard: That is all, if your Honor please.

Mr. Donart: Could I see the exhibits that had those three different tare weights?

Mr. Shepard: I will leave them all with Mr. Donart.

I would like at this time to renew my objection to the admission of any of those documents, on the ground that there has not been sufficient foundation laid; insofar as a record appears, they are nothing but hearsay evidence.

The Court: Overruled.

Redirect Examination

Q. (By Mr. Donart): Calling your attention to those three weigh tickets. [144] The first one, I believe, shows a gross weight of 39,206?

A. That's correct.

Q. And a tare weight of 28,430?

A. That's correct.

Q. And a net weight of the truck load of 11,830? A. Yes, sir.

Q. Now, on your second one, doesn't it show a gross weight of 33,180? A. Yes.

Q. And a net tare weight of 21,000?

(Testimony of James R. Yost.)

A. That's right.

Q. And on the third one a gross weight of 34,380 and a tare weight of 20,800?

A. Yes, sir.

Q. And on the second one it shows a net weight of the cattle 12,180? A. Yes, sir.

Q. Just a few hundred pounds more than the previous? A. That's right.

Q. And in the last one a net weight of cattle of 13,580? A. Yes.

Q. Now, state whether or not the gross weight of that truck, where the tare weight has increased as much as it has, the gross weight of the truckload isn't nearly 5,000 pounds heavier than either of the others? [145]

A. I don't quite follow you, George.

Q. Here, 39,260, what is your next?

A. 33,180.

Q. And the next one 34,380? A. 34,380.

Mr. Donart: That is all.

Mr. Shepard: That's all.

(Witness excused.)

Mr. Donart: (To counsel) We have made a request for the production of a letter which we were advised that you had. May I have that letter?

(Discussion between counsel.)

(Whereupon, document was marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Shepard: Your Honor, in the interest of

perhaps saving time, Mr. Donart evidently anticipates going through the formality of introducing that. We would stipulate at this time that the plaintiff, Mr. Yost, made demand on the defendant for payment of this note and mortgage.

The Court: Accept that?

Mr. Donart: No. We want to show our demand and their answer to it and how that answer differs from their later position.

The Court: All right, stipulation not accepted.

Mr. Donart: Now, I would like to have marked as [146] Plaintiff's Exhtibit 5 (1) the first page of Plaintiff's Exhibit 5. It was admitted as part of another exhibit and admitted conditionally.

The Court: All right, it may be received and marked in the fashion you describe.

(Whereupon, document marked Plaintiff's Exhibit 5 (1) for identification.)

Mr. Donart: We now offer in evidence Exhibit No. 13 and 5 (1) and if the Court feels that foundation has been laid, we will ask permission to call Mr. Padgett to the witness stand and testify how he came by one of the letters.

The Court: Can't you stipulate to that?

Mr. Shepard: We would like to see the two letters together. I don't know what theory Mr. Donart is trying to put together again.

We will conditionally enter into a stipulation that the letters may go into evidence for what they purport to show, if Mr. Donart will stipulate as to later letters setting forth the position concerned, in the same year.

Mr. Donart: Why, sure.

Mr. Shepard: And the same people.

Mr. Donart: You wouldn't need my stipulation. they would be admissible. I just told you——

The Court: All the letters are in evidence. [147]

(Whereupon, Plaintiff's Exhibits Nos. 13 and 5 (1) for identification were received in evidence.)

(Discussion between counsel.)

Mr. Shepard: Will you produce that and place that in evidence?

(Discussion between counsel.)

Mr. Shepard: Is this a copy of the letter, Mr. Donart?

Mr. Donart: Yes, it is a true copy of the letter, I am sure.

Mr. Shepard: May we have this marked and go in, your Honor, as a true and correct copy?

The Court: You may.

Mr. Donart: No objection at all.

(Whereupon, letter was marked Defendants' Exhibit No. 14 in Evidence.)

Mr. Donart: We rest.

Mr. Shepard: I have a very brief witness.

GRACE A. BUTCHER

called as a witness, in surrebuttal, by the defendants, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name for the record?

A. Grace Alberta Butcher. [148]

Direct Examination

Q. (By Mr. Shepard): Where do you reside, Mrs. Butcher? A. Parma, Route 2.

Q. You are the wife of Clayton Butcher, the defendant in this action? A. Yes.

Q. Did you hear the testimony that has gone on preceding yours today? A. Yes.

Q. You were in the courtroom? A. Yes.

Q. Did you hear the testimony of Mr. Yost regarding your running an adding machine tape in your home, in your dining room?

A. I think he must be mistaken.

Q. You heard the testimony? A. Yes.

Q. Have you ever owned an adding machine?

A. No.

Q. To your knowledge has there ever been one in your home? A. No.

Q. Did you ever run an adding machine tape in your dining room? A. No. [149]

Q. Totaling up those so-called scale weights?

A. No.

Q. You did not? A. No.

Q. You never owned an adding machine of any type, description or make of any kind?

(Testimony of Grace A. Butcher.)

A. No. No.

Mr. Shepard: That is all.

Mr. Donart: No cross-examination.

(Witness excused.)

Mr. Shepard: That is all. The defendant rests.

Mr. Donart: So do we.

The Court: You may have 5 minutes apiece to argue the matter, if you want to.

Mr. Donart: I was going to add, there is very little question in here about foreclosure, and I was wondering if, instead of arguing this orally we couldn't submit it to the Court by a written memorandum, which I will agree to get into the mail by tomorrow night. I would like to check along and see if there has been any criticism of that case of York versus Roberts.

The Court: With reference to the ensilage, you mean?

Mr. Donart: Yes, the case as to whether you still have to foreclose. [150]

The Court: It seems to be ridiculous, Mr. Donart.

Mr. Donart: I thought it was ridiculous.

The Court: It's absolutely worthless, it is conceded it is worthless.

It might be a good idea to brief that, particularly to this extent, as to what extent I am to be bound by that decision under the federal rules.

Mr. Donart: That's right.

The Court: You want 5 days to reply to that, Mr. Shepard?

Mr. Shepard: No, if your Honor please, I can't see taking a position. I feel, if the Court please, it is ridiculous, the whole thing. What ever the Court's decision is, I don't know whether the Court wants to make it from the bench now or after Mr. Donart's submission. Whichever way is perfectly satisfactory with the defendant. I can't see that it makes any difference myself.

The Court: Why don't you wait and see, and in excess of caution, what Mr. Donart is going to say in his memorandum. I don't want to cut you off.

Mr. Shepard: With that understanding, may I have 5 days following receipt of Mr. Donart's?

Mr. Donart: My brief will be in the mail tomorrow night.

The Court: All right. I will take it up under [151] submission then with that undesrtanding. Matter submitted.

Mr. Shepard: If your Honor please, the brief, as I understand it, is merely on this point as to what is done as far as foreclosing?

Mr. Donart: I was going to set forth in that just a brief statement of what I would argue here orally if I argued it today.

Mr. Shepard: Oh, in that case, I very definitely would want time. I misunderstood. I'm sorry.

The Court: I am not going to confine Mr. Donart or am I going to confine you to just one particular, precise point. You may argue it in the same fashion if you would if you were going to present it orally in open court.

Mr. Shepard: I understood that we were going to argue orally now on the other points. Such is not the case?

The Court: I don't think it would be necessary.

Mr. Donart: You would be arguing it piecemeal.

The Court: Do you want five days to answer that?

Mr. Donart: Well, if they raise new matter, give me one day to answer. [152]

[Endorsed]: Filed April 21, 1958.

[Endorsed]: No. 15998. United States Court of Appeals for the Ninth Circuit. James R. Yost, Appellant, vs. Alberta G. Morrow, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: April 28, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15998

JAMES R. YOST, Appellant,

vs.

C. A. BUTCHER and ALBERTA G. MORROW, Appellees.

DESIGNATION OF POINTS UPON WHICH APPELLANT WILL RELY FOR REVERSAL

Comes Now the Appellant and files his Designation of Points upon which he will rely for reversal of the Judgment made and entered in the District Court of the United States for the District of Idaho, Southern Division, as follows:

I.

The Trial Court erred in granting the Motion of the Appellee Morrow to dismiss the action as to her;

II.

The Trial Court erred in making and entering that portion of Finding of Fact number II which reads as follows:

"That said note was made, executed and delivered by the said defendant Alberta G. Morrow without consideration;"

III.

That the Trial Court erred in making and enter-

ing Conclusion of Law number 1 for the reason that there was a consideration for the signing of said note by appellee Alberta G. Morrow in that the law imports and implies such a consideration; that there was an actual consideration consisting of a detriment to the obligee in that he loaned the Appellee Butcher Seven Thousand Three Hundred ($7,300.00) Dollars, because of the signature of the Appellee Morrow upon said note; that no consideration is necessary to authorized a recovery against an accommodation maker;

IV.

The Court erred in making and entering that portion of the Judgment entered in said District Court which reads as follows:

"That the above entitled action insofar as it affects the defendant Alberta G. Morrow be and the same is hereby dismissed."

upon the grounds urged as error in making and entering Conclusion of Law number I;

Appellant's contentions are that the execution of the note by the Appellee Morrow is admitted by the pleadings; that the undisputed testimony shows that her signature on the note was demanded by the Appellant before he would make the loan: that the execution and delivery of a promissory note imports a consideration and a consideration is presumed; that the undisputed testimony shows that there was an actual consideration for the signature of the Appellee Morrow upon the note, to-wit, the making of the loan by the Appellant to the Ap-

pellee Butcher, the son-in-law of the Appellee Morrow; that the Appellee Morrow was an accommodation maker of said note and the fact that she, the accommodation maker, received no consideration for the execution or delivery of said note is no defense to an action thereon against her for its collection.

/s/ GEO. DONART,
/s/ JAMES B. DONART,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 7, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD NECESSARY FOR DETERMINATION OF APPEAL

Comes Now, The Appellant and designates the following portion of the record as being all of the record which is material to the consideration of the appeal, to-wit:

The Judgment Roll consisting of:

The Complaint;

The Answer and Cross-Complaint;

The Answer to the Cross-Complaint;

The Amended Findings of Fact and Conclusions of Law;

The Judgment entered in the above entitled action.

The Reporter's Transcript of the testimony and proceedings taken at the trial of said action.

The Exhibits introduced and admitted on the trial of said action, particularly Plaintiff's Exhibits 1, 2, 3 and 4.

/s/ GEO. DONART,
/s/ JAMES B. DONART,
Attorneys for the Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 7, 1958. Paul P. O'Brien, Clerk.

No. 15998

United States
Court of Appeals
for the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division.

FILED
AUG 29 1958

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—8-1-58

No. 15998

United States
Court of Appeals
for the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

Supplemental
Transcript of Record

**Appeal from the United States District Court
for the District of Idaho,
Southern Division.**

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—8-1-58

In the District Court of the United States in and for the District of Idaho, Southern Division

No. 3270

JAMES R. YOST,

Plaintiff,

vs.

C. A. BUTCHER and ALBERTA G. MORROW,

Defendants.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial at Boise, Idaho, the 23rd day of October, 1957, Geo. Donart of the firm of Donart & Donart of Weiser, Idaho, appearing as attorney for the plaintiff, and Allan G. Shepard and William R. Padgett, both of Boise, Idaho, appearing as attorneys for the defendants.

Witnesses were sworn and examined and documentary evidence introduced. At the close of the plaintiff's case counsel for the defendant moved for a Judgment of Nonsuit and Dismissal in favor of the defendant Alberta G. Morrow upon the ground that the defendant Morrow received no consideration for the execution of the promissory note in question, which Motion was taken under advisement by the Court and at the close of the defendants' case was again renewed by defense counsel and said Motion was granted and the cause ordered dis-

missed insofar as it affected the said Alberta G. Morrow. After both sides had rested their respective cases the cause was submitted to the Court for consideration and determination.

The Court being fully advised as to the law and the premises hereby makes and enters its Findings of Fact and Conclusions of Law as follows:

I.

That the plaintiff is a resident of and domiciled at the City of Nyssa in the County of Malheur, State of Oregon; that the defendant, C. A. Butcher is a resident of and domiciled at the City of Parma, in the County of Canyon, State of Idaho; that the defendant, Alberta G. Morrow is a resident of and domiciled in the County of Idaho, State of Idaho, and jurisdiction of the above-entitled Court in this action is grounded upon the diversity of citizenship of the parties hereto;

II.

That at Nyssa, Oregon, on or about October 17, 1955, the defendants C. A. Butcher and Alberta G. Morrow, who then and there was and now is a widow, made, executed and delivered to the plaintiff their certain promissory note in writing wherein and whereby they jointly and severally promised and agreed to pay to the order of the plaintiff at Nyssa, Oregon, on or before April 15, 1956, the sum of Seven Thousand Three Hundred ($7,300.00) Dollars, lawful money of the United States of America, with interest thereon in like lawful money

at the rate of six per cent per annum from the date thereof until paid, which note was in words and figures as follows:

"$7,300.00

"October 17, 1955.

"On or before April 15, 1956, after date, for value received we promise to pay to the order of James R. Yost at the First National Bank of Portland at Nyssa, Oregon, Seven Thousand Three Hundred and 00/100 Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of 6 per cent, per annum, from date until paid. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for attorneys fees to be allowed in said suit or action.

"C. A. BUTCHER,

"ALBERTA G. MORROW."

That said note was made, executed and delivered by the defendant C. A. Butcher for a valuable consideration; that said note was made, executed and

delivered by the said Alberta G. Morrow without consideration;

III.

That at Nyssa, Oregon, and on or about the 17th day of October, 1955, and coincident with the execution and delivery of said note and to secure the payment of the sums due to become due thereunder according to the terms and tenor thereof, the defendant, C. A. Butcher, who was then and there the owner of the personal property hereinafter described, made, executed, and delivered to the plaintiff his certain indenture of mortgage conditioned upon the payment of said note wherein and whereby he mortgaged to the plaintiff the following described personal property situate in the County of Canyon, State of Idaho, to wit:

460 tons of ensilage;
39 tons of grain;
30 tons of straw;
40 tons of hay.

IV.

That said Chattel Mortgage was duly acknowledged by the maker thereof so as to entitle the same to be placed of record and also thereafter on October 20, 1955, filed for record in the office of the County Recorder of Canyon County, Idaho, and appears of record therein as Instrument No. 426919;

V.

That the said Chattel Mortgage contained a clause wherein it was provided that in the event the maker

should fail to pay said promissory note at the time the same should become due the condition of said Chattel Mortgage would become broken and the holder thereof should be entitled to have the same foreclosed; that the said promissory note is now past due and unpaid and although demand has been made upon the defendants to pay the same the defendants have not paid the sums due on the said promissory note, or any part thereof, except the sum of Eight Hundred Seventy-nine ($879.00) Dollars, which was paid on April 6, 1956, and the sum of One Hundred Sixty-three ($163.00) Dollars, paid May 24, 1956, and by reason of the failure of said defendants to pay said note when the same became due the condition of said Chattel Mortgage has become broken and the plaintiff is entitled to have the same foreclosed;

VI.

That the plaintiff is now the owner and holder of said Note and Chattel Mortgage and no prior proceedings have been had either at law or in equity for the collection thereof;

VII.

That there is now due, owing and unpaid from the defendant C. A. Butcher to the plaintiff the sum of Six Thousand Two Hundred Fifty-eight ($6,258.00) Dollars, together with interest thereon at the rate of six per cent per annum from April 6, 1956;

VIII.

That both the note above mentioned and the Chattel Mortgage, so executed by the defendant Butcher in favor of the plaintiff, contained a clause wherein it is provided that if suit or action be instituted to collect said note or foreclose said Chattel Mortgage a reasonable sum should be allowed the plaintiff as attorney's fees for such suit or action; that the sum of Six Hundred ($600.00) Dollars, is a reasonable sum to be allowed the plaintiff as attorneys fees in this action if the foreclosure of said Chattel Mortgage and collection of said note be not contested; that if the foreclosure thereof or the collection of said note should be contested the sum of Seven Hundred Fifty ($750.00) Dollars, is a reasonable sum to be allowed the plaintiff as attorneys fees in this action and the plaintiff has become obligated to pay his attorneys a reasonable sum for their services herein rendered and to be rendered;

IX.

That the only portion of said mortgaged chattels now in existence is some spoiled ensilage and the property still in existence and encumbered by said Chattel Mortgage is worthless and the foreclosure thereof would be a useless formality;

X.

That on or about the 15th day of July, 1955, the plaintiff James R. Yost and the defendant C. A. Butcher entered into a valid contract by the terms of which it was agreed that the plaintiff should

deliver to said defendant approximately four hundred (400) head of weaner and yearling cattle on or before November 15, 1955, and that said cattle should be fed and cared for by said defendant at his own expense for a period of one hundred fifty (150) days and that as full and complete compensation for furnishing said feed and caring for and full feeding said cattle and furnishing all facilities therefor the plaintiff should pay to the defendant fifteen cents (15c) per pound for the entire gain per animal so to be fed by the defendant;

XI.

That the defendant was not induced to enter into said contract by any fraud on the part of the plaintiff and the plaintiff did not represent to the defendant that he was the owner of all of said cattle but the defendant well knew at the time said cattle were delivered to him that approximately three hundred (300) head of said cattle were the property of one John Stringer;

XII.

That the defendant Butcher cared for and fed said cattle on his ranch in Canyon County, Idaho, from November 28, 1955, until April 6, 1956, when said cattle were removed by the plaintiff Yost without any protest on the part of the defendant Butcher;

XIII.

That the defendant Butcher was not damaged by the removal of said cattle for the reason that the

price he was receiving for feeding said cattle was less than the necessary and absolute cost of continuing to feed said cattle;

XIV.

That the defendant Butcher became entitled to a credit upon said promissory note for money due him for feeding said cattle in the sum of Eight Hundred Seventy-nine ($879.00) Dollars, which was credited on April 6, 1956:

From the Foregoing Facts the Court Legally Concludes:

I.

That the above-entitled action insofar as it relates to the defendant Alberta G. Morrow should be dismissed;

II.

That there is due the plaintiff from the defendant Butcher the sum of Six Thousand Two Hundred Fifty-eight ($6,258.00) Dollars, together with interest thereon at the rate of six per cent per annum from April 6, 1956, together with attorneys fees in the sum of Seven Hundred Fifty ($750.00) Dollars, and the plaintiff is entitled to judgment against the defendant C. A. Butcher in said amounts;

III.

That while the payment of said sum was originally secured by a Chattel Mortgage, the security has become worthless and it is unnecessary that said Chattel Mortgage be foreclosed.

Let Judgment be entered accordingly.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

March 21, 1958.

[Endorsed]: Filed March 24, 1958.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are the additional portion of the original files designated by the parties:

1. Amended Findings of Fact and Conclusions of Law.

2. Amended Designation of Contents of Record on Appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 24th day of July, 1958.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15998. United States Court of Appeals for the Ninth Circuit. James R. Yost, Appellant, vs. Alberta G. Morrow, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed July 26, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15,998

United States Court of Appeals
For the Ninth Circuit

JAMES R. YOST,
Appellant,

vs.

ALBERTA G. MORROW,
Appellee.

APPELLANT'S OPENING BRIEF.

DONART & DONART,
Idaho First National Bank Building,
Weiser, Idaho,
Attorneys for Appellant.

FILE
SEP
PAUL

Subject Index

Page

Jurisdictional statement 2

Statement of the case 2

Specifications of error 6

Specification No. 1 6

Specification No. 2 6

Specification No. 3 7

Argument 8

A. Under the law and the evidence in the instant case the trial court erred in finding that there was a lack of consideration for the promissory note in question as to the appellee, Morrow, and yet at the same time finding that there was a consideration to support the promissory note as to her co-maker, the defendant, Yost 8

B. The trial court erred in finding that there was a lack of consideration for the promissory note in question as to the appellee Morrow, and yet at the same time finding that there was a consideration to support the promissory note as to her co-maker, the defendant, Yost, inasmuch as the defendants in their answer had admitted the execution and delivery of said note for a good and valuable consideration 16

C. The trial court may not disregard positive uncontradicted evidence susceptible of contradiction by an available witness 21

Conclusion 22

Table of Authorities Cited

Cases	Pages
Alabama Title & Trust Co. v. Millsap, 71 Fed. 2d 518	21
Bloom v. Pioneer State Bank, 223 P. 750, 75 Colo. 28	12
Central Bank of Bingham v. Perkins, 251 P. 627, 42 Idaho 310	8, 11
Chambers v. Carrese, 299 P. 91	12
Commissioner of Internal Revenue v. New York Life Ins. Co., 65 Fed. 2d 347	16
Crocker Nat. Bank of San Francisco v. Say, 288 P. 69, 206 Cal. 436	13
Dressler v. Johnston, 21 P. 2d 969, 131 Cal. App. 690	17
Farmers' Nat. Bank of Pilger v. Ohman, 199 N.W. 802, 112 Neb. 491	12
First Trust & Savings Bank v. Randall, 58 Ida. 705, 89 P. 2d 741	21
Gibson v. Southern Pac. Co., 67 Fed. 2d 758	21
Idaho Times Publishing Company v. Industrial Accident Board, 63 Ida. 720, 126 P. 2d 573	21
In re Odberg's Estate, 67 Ida. 447, 182 P. 2d 945	21
Liberty Nat. Bank of Weatherford v. Semkoff, 84 P. 2d 438, 184 Okl. 18	17
Mary E. Smiley v. John W. Smiley, 269 P. 589	17
Miller v. Advance Transp. Co., 126 Fed. 2d 442	16
Moriconi v. Flemming, 271 P. 2d 182	13
Mulany v. Murray, 216 P. 1105, 68 Mont. 245	13
Mutual Life Ins. Co. v. Sargent, 51 Fed. 2d 4	21
Order of Railway Conductors v. Jones, 239 P. 882 (Colo.)	16
Penn. Mut. Life Ins. Co. v. Orr, 252 N.W. 745, 217 Iowa 1022	12
Peterson v. Universal Automobile Ins. Co., 20 P. 2d 1016, 53 Idaho 11	17
Pierstorff v. Gray's Auto Shop, 58 Ida. 438, 73 P. 2d 171	21
Russell v. Dilley, 159 N.W. 189 (Iowa)	16

Pages

Seth v. Lew Hing, 15 P. 2d 190, 125 Cal. App. 729 12
Spear v. Ryan, 208 P. 1069, 64 Mont. 145 13
Stockmens State Bank v. Pollat, 264 N.W. 875 12
Swanson v. Sanders, 58 N.W. 2d 809, 75 S.D. 40 12

Wasatch Livestock Loan Co. v. Lewis & Sharp, 35 P. 2d 835, 84 Utah 347 17
Weed v. Idaho Copper Co., 10 P. 2d 613, 51 Idaho 737 17
Weicker v. Bromfield, 34 Fed. 2d 377 21
Willoughby v. Ball, 90 P. 1017, 18 Okl. 535 13

Rules

Rules of Civil Procedure, Rule 8-C 19

Statutes

Idaho Code (1947), Section 27-206 10

Uniform Negotiable Instruments Law, Section 29 10

28 U.S.C.:
Section 1291 2
Section 1294 2
Section 1332 2

Texts

7 American Jurisprudence, Bills and Notes, Section 250, page 946 8, 11

10 Corpus Juris Secundum:
Section 144, page 600 8, 12
Section 625, page 1257, Bills and Notes 15

11 Corpus Juris Secundum, Bills and Notes:
Section 742, page 297 13
Section 748, pages 303 and 304 13

71 Corpus Juris Secundum, Pleading, Section 59, pages 147, 148, 149, 150, 151, 152 17

No. 15,998

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

APPELLANT'S OPENING BRIEF.

This action was brought by the Appellant, a resident of the State of Oregon, against one C. A. Butcher and the Appellee Morrow, to foreclose a chattel mortgage on hay, grain and other feed or in the alternative if it should be found that none of the mortgaged property was still in existence for a judgment on the promissory note secured by the mortgage. The trial was had before the Court sitting without a jury and at the close of the evidence the Court granted a dismissal as to the Defendant and Appellee Morrow and rendered judgment in favor of the Appellant and against the said Butcher for the amount due upon the note sued upon. This appeal is prosecuted from the portion of the judgment dismissing the action as to the Appellee Morrow.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court: Original jurisdiction over this action was based solely upon diversity of citizenship and was conferred upon the trial Court by 28 U.S.C. Section 1332.

Jurisdiction of this Court to review the judgment upon appeal: 28 U.S.C. Section 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1294 provides, in part, that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

The pleadings necessary to show the existence of jurisdiction are the Complaint (R. 3 to 10) and the Answer filed jointly by the Appellee and other Defendants (R. 18 to 22).

The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgment in question on appeal have been heretofore alluded to, and will be given more detailed consideration in the following summary and statement of the case.

STATEMENT OF THE CASE.

The Complaint of the Plaintiff-Appellant (R. 3 to 10) is a simple Complaint for the foreclosure of a

Chattel Mortgage against the Appellee and one Butcher alleging, however, that the mortgaged property may no longer be in existence and if such be found to be the case a judgment upon the note secured by the Chattel Mortgage is sought against both of the makers thereof.

The Complaint in paragraphs II and III (R. 3, 4 and 5) alleges the execution and delivery of the note and chattel mortgage by the Appellee Morrow and the Defendant Butcher for a valuable consideration. The Answer and Cross-Complaint (R. 18 to 22) admits the allegations contained in paragraphs II, III and IV of the Complaint, in admitting that the note and mortgage were executed *for a valuable consideration.* The Answer impleads as a counterclaim a fraudulent breach of a written contract for the wintering of livestock (R. 18 to 22; R. 23 to 27). The Complaint further alleges and the Answer admits the domicile of the parties showing diversity of citizenship (R. 3, 18). There was admitted in evidence plaintiff's Exhibits 1 and 2, being the note and mortgage in question (R. 42); there was also admitted Exhibits 3 and 4, being the checks evidencing the payment to the Defendant Butcher of the amount of money making up the mortgage. The only reference to the note in question is found as follows:

Appellant testified as follows:

> "I made the checks to Butcher for the feed that he was to furnish that is the $6500 was a loan that I took in advance of this contract of Mr. Butcher, therefore, I made the check to him. The

$800.00 was a payment on the contract. *Mrs. Morrow was asked to sign the notes to secure the mortgage.*

Q. Did she sign the note?

A. Yes, she did." (R. 44).

On cross-examination the Appellant testified that he did not discuss the making of the note and mortgage with the Appellee. He merely requested her signature on the note; that he made this request of the Defendant Butcher for the reason that there wasn't sufficient security and because Mrs. Morrow owned the land upon which the mortgaged feed was raised (R. 52). Further the Appellant testified that Mrs. Morrow was never talked to at all about the contract between Butcher and the Appellant and that all the Appellant did was to insist that she countersigned on the note before he made the loan (R. 60 and 61). The Defendant Butcher further testified that the Appellant told him that before Butcher would get his loan the Appellant had to have the note and mortgage and that he had to have Butcher's mother-in-law, Mrs. Alberta G. Morrow, sign the note (R. 86). Mrs. Morrow testified that she did not talk with the Appellant at the time she signed the note and that she signed the note at Nyssa, Oregon (R. 135). She further testified that she was told by the Appellant's attorney that the reason the Appellant wanted her to sign the mortgage was that she owned the property wherein the mortgaged feed was raised (R. 136 and 137). She was also asked by her counsel:

"Did you ever receive any money from Mr. Yost on this?" (meaning the note and mortgage)

to which the Plaintiff objected upon the ground that it was immaterial and the objection was overruled by the Court and Mrs. Morrow answered:

"No".

She never gave any reason why she signed the note. Her testimony related entirely to her reason for signing the mortgage.

The note showed on its face that it was past due and the Plaintiff-Appellant testified to the offsets against the note. Upon the pleadings and from the evidence so introduced the Court made and entered Findings of Fact, finding the due execution and delivery of the note and that the note was "made, executed and delivered by the Defendant C. A. Butcher for a valuable consideration", and that the said note was made, executed and delivered by the said Defendant Alberta G. Morrow without consideration (this Finding notwithstanding the fact that the Answer admitted that the note was delivered by the Defendants for a valuable consideration) (Finding No. II, R. 174).

The Court further found Finding No. IX that the only portion of the mortgaged chattels then in existence consisted of some spoiled ensilage which was worthless and that the foreclosure of the mortgage would be a useless formality (R. 178).

By Findings Nos. XI and XIII (R. 179) the Court found against the contention of the defendants that the Defendant Butcher was induced to enter into the contract upon which his counterclaim was based by any fraud on the part of the Plaintiff and that the

Defendant did not make the representations as an inducement for the execution of the contract charged in the counterclaim and further found that the Defendant Butcher was not damaged by any action of the Plaintiff in removing the cattle from the feed lot (R. 179-180).

Upon the Findings so entered and the Conclusions of Law based thereon the Court entered judgment in favor of the Appellant against the Defendant Butcher for the sum of $6,258.00 with interest and attorneys' fees and further entered a judgment that the action insofar as it affects the Defendant Alberta G. Morrow was dismissed (R. 33 and 34).

From the portion of the judgment directing dismissal against the Defendant Alberta G. Morrow this appeal is taken (R. 35).

SPECIFICATIONS OF ERROR.

Specification No. 1.

The trial Court erred in granting the Motion of the Appellee Morrow to dismiss the action as to her.

Specification No. 2.

The trial Court erred in making and entering that portion of Finding of Fact No. II which reads as follows:

> "That said note, was made, executed and delivered by the said defendant Alberta G. Morrow without consideration;"

for the reason that the Complaint alleges and the Answer of the Defendants admits and the undisputed evidence discloses that the note was delivered for a valuable consideration.

Specification No. 3.

The trial Court erred in making and entering that portion of the Judgment entered in said District Court which reads as follows:

> "That the above entitled action insofar as it affects the defendant Alberta G. Morrow be and the same is hereby dismissed."

upon the ground that the portion of said Judgment appealed from is contrary to the law and the evidence for the following reasons:

The Pleadings admit that the note sued upon was delivered by the Defendants for a valuable consideration; that the evidence discloses that there was a consideration for the signing of the note by the Appellee Alberta G. Morrow for the reason that the law imports such a consideration and there was an actual consideration consisting of a detriment to the obligee in that he loaned the Defendant Butcher $7300.00 because of the signature of the Appellee Morrow upon said note; that no consideration is necessary to authorize a recovery against an accommodation maker.

ARGUMENT.

A. UNDER THE LAW AND THE EVIDENCE IN THE INSTANT CASE THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A LACK OF CONSIDERATION FOR THE PROMISSORY NOTE IN QUESTION AS TO THE APPELLEE, MORROW, AND YET AT THE SAME TIME FINDING THAT THERE WAS A CONSIDERATION TO SUPPORT THE PROMISSORY NOTE AS TO HER CO-MAKER, THE DEFENDANT, YOST.

The trial Court in the amended Findings of Fact found that the promissory note in question was made, executed and delivered by the Defendant, C. A. Butcher, for a valuable consideration. That said note was made, executed and delivered by the Appellee, Alberta G. Morrow, without consideration (Finding II, R. 175-176). The law is well settled in Idaho as well as in every other jurisdiction that where a consideration passes to one co-maker of a promissory note such consideration is sufficient to support the obligation of the other co-maker.

Central Bank of Bingham v. Perkins, 251 Pac. 627, 43 Idaho 310;
American Jurisprudence, p. 946, Sec. 250;
10 *Corpus Juris Secundum,* p. 600, Sec. 144.

Under the evidence in the instant case the rule above stated applies. Plaintiff in his complaint alleged (R. 3, 4) and Defendants in the answer admitted (R. 18) the execution and delivery for a valuable consideration of the promissory note in question. At the trial the execution of the note by both parties was again admitted (R. 45). It is undisputed in the evidence that two checks, one in the amount of $6,500.00 and another in the amount of $800.00, drawn by the Plain-

tiff in favor of the Defendant, C. A. Butcher, were delivered to the Defendant and by him negotiated (R. 43-47). It is furthermore undisputed that the amount of these checks was the amount of the promissory note in question and that they represented the consideration for the note. The record therefore discloses that the promissory note in question was signed by the Defendant, Butcher, and the Appellee, Morrow, and that the note was supported by a consideration being the exact sum of money shown on the face of the note which was paid by the Plaintiff to the Defendant, Butcher. Nowhere in the record is there any evidence to support any possible defense to this situation on the part of either the Defendant, Butcher, or the Appellee, Morrow. The Appellee, Morrow, testified (R. 136-137) that she was asked to sign the *mortgage* because she owned the property where the feed was raised. She further testified (R. 137) that she did not receive any money from Mr. Yost. It might appear at first glance that this evidence was introduced to show fraud in the procurement of Mrs. Morrow's signature on the *note*. Close inspection, however, discloses that her testimony related to the mortgage rather than to the note. Furthermore, Mrs. Morrow did, in fact, own the land and the procurement of her signature on the mortgage for that purpose would certainly be a legitimate reason for asking her to sign the mortgage. Nowhere in the record does she try to explain away her signature on the note. She did not testify as to her signature on the note or as to why she signed it and there is certainly no evidence in the record or any

evidence from which an inference could be drawn that there was any misrepresentation as to the legal effect of the note or any promise of forbearance to sue on the note in the event of a default. The record, therefore, further discloses that the Appellee, Morrow, signed the note and that there was no fraudulent inducement for the procurement of her signature. Furthermore, fraud to induce her execution and delivery of the note is not pleaded nor is there any finding by the Court that there was fraud.

From the evidence disclosed in the record it appears, therefore, that the Appellee, Morrow, as comaker of the note was at least an accommodation maker. That being the case grouped with the fact that admittedly a consideration passed to the Defendant, Butcher, from the Plaintiff, Yost, gives rise to a situation where under the Law of the State of Idaho and under the Negotiable Instruments Law generally, the defense of lack of consideration to the accommodation maker cannot be raised. Section 27-206 of the Idaho Code (1947) provides as follows:

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

The language of the above quoted statute is identical to Section 29 of the Uniform Negotiable Instru-

ments Law. The Idaho statute as well as the Uniform Act have been construed to mean that it is sufficient if a consideration passes to the principal maker of the note and that an accommodation maker is liable thereon. This statute was interpreted by the Supreme Court of Idaho in the case of *Central Bank of Bingham v. Perkins, supra,* wherein the following language is found:

> "Conceding that respondent stands in the shoes of the Citizens' Bank and that any defense appellant could have made to an action by the Citizens' Bank was available against respondent, the fact that the maker received no consideration for the note will not excuse him from having to pay it. He was an accommodation maker; he signed the note without any consideration moving to himself with the intention of lending his credit to the promoters of the mine. The note was given to the bank for the accommodation of the promoters and they received the consideration. That the accommodation maker received no consideration is not a defense to the payment of the note."

The rule as above stated by the Supreme Court of Idaho is consistent with a great weight of authority. The rule with respect to co-makers is stated in 7 *American Jurisprudence,* Bills and Notes, Section 250, page 946, as follows:

> "However, consideration once given for a negotiable instrument is consideration in respect to all parties to it at that time, as well as to all subsequent parties where the consideration moves on the agreement that further security will be

obtained and they sign it having knowledge of such agreement."

A rule is stated to the same effect in 10 *Corpus Juris Secundum,* Section 144, page 600, Bills and Notes, as follows:

"A good consideration moving to one of several joint makers is good and sufficient as to all of them; and, not only does the original consideration moving from the payee to the maker of a bill or note support the contemporaneous undertakings of comakers, but it will sustain the liability of secondary obligors who have contemporaneously affixed their signatures or become such prior to the delivery of the instrument to the payee."

The above quoted rules have been universally followed by the Courts, see:

Seth v. Lew Hing, 15 P. 2d 190, 125 Cal. App. 729;

Farmers' Nat. Bank of Pilger v. Ohman, 199 N.W. 802, 112 Neb. 491;

Stockmens State Bank v. Pollat, 264 N.W. 875;

Bloom v. Pioneer State Bank, 223 P. 750, 75 Colo. 28;

Swanson v. Sanders, 58 N.W. 2d 809, 75 S.D. 40;

Penn. Mut. Life Ins. Co. v. Orr, 252 N.W. 745, 217 Iowa 1022;

Chambers v. Carrese, 299 P. 91.

Dealing now specifically with accommodation makers as distinguished from joint makers we find that the same rule with respect to consideration mov-

ing to one of the makers being sufficient to support the obligation of both makers of the note is stated in 11 *Corpus Juris Secundum,* Bills and Notes, Section 742, page 297, as follows:

> "The consideration for an accommodation signature may consist of a detriment suffered by the payee."

Continuing further at pages 303 and 304, Section 748 that rule is elaborated upon as follows:

> "While the want of consideration moving to the accommodation party is a defense in an action by the accommodated party as shown supra §746, or, in some jurisdictions, where the action is by a transferee after maturity as shown infra this section subdivision a (3) nevertheless, both at common law and under the Negotiable Instruments Act, where the action is by a holder for value and in good faith, it does not constitute a defense and such holder may recover thereon, and this is so, although the holder had knowledge, before the paper was transferred to him, that it was accommodation paper."

This rule likewise is universal in its application and has been followed by the Courts in virtually every jurisdiction wherein the question has been presented.

Willoughby v. Ball, 90 P. 1017, 18 Okl. 535;

Mulany v. Murray, 216 P. 1105, 68 Mont. 245;

Spear v. Ryan, 208 P. 1069, 64 Mont. 145;

Crocker Nat. Bank of San Francisco v. Say, 288 P. 69, 206 Cal. 436;

Moriconi v. Flemming, 271 P. 2d 182 (Cal. App.).

From the foregoing authorities it may be seen that the law is well settled that a consideration passing from the payee to one co-maker is sufficient to support the obligation of the other co-maker of the note. Applying the law as hereinbefore stated to the situation in the instant case it is at once apparent that under the evidence in this case the trial Court erred in finding that there was a lack of consideration with respect to the Appellee, Morrow, and in entering a judgment of dismissal as to the Appellee, Morrow, while expressly finding that the note in question was supported by a good and valuable consideration as to the Defendant, Butcher. The evidence clearly discloses the passing of a sufficient consideration from the Appellant to the Defendant, Butcher, namely the sum of Seventy-three Hundred ($7300.00) Dollars in money. Or stated differently, a detriment suffered by the Appellant to the advantage of the Defendant, Butcher, by the payment of the sum of Seventy-three Hundred ($7300.00) Dollars. Under the well settled law, hereinbefore set forth, the Appellee, Morrow, cannot escape liability on this obligation by reason of lack of any consideration passing to her. While the law may recognize certain defenses that an accommodation maker might plead and prove as a defense to an action on a note by the payee, lack of consideration passing from the payee to the accommodation maker is not a defense. *Corpus Juris Secundum* deals specifically with the question of defenses that may be asserted by a joint maker of a note and concludes that it is no defense that there was no consideration as to

one of the joint makers if there was a consideration to the others. The rule is stated in 10 *Corpus Juris Secundum,* Bills and Notes, Section 625, page 1257, as follows:

> "A plea by one joint maker that the note in suit was without consideration as to him is bad unless it negatives a consideration to a third party with his knowledge or with detriment to the promisee."

We respectfully urge, therefore, that the record does not disclose that the Appellee, Morrow, has established any defense recognized by the law as a valid defense to her obligation as a co-maker of the promissory note in question and that lack of consideration passing from the payee to the accommodation maker is not a defense recognized by the law in an action by the payee against the accommodation maker when there was, in fact, a consideration given to the accommodated party and that the trial Court, therefore, erred in entering a judgment of dismissal against the Appellee, Morrow, while at the same time finding that the note in question was supported by a good and valuable consideration as to her co-maker the Defendant, Butcher.

B. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A LACK OF CONSIDERATION FOR THE PROMISSORY NOTE IN QUESTION AS TO THE APPELLEE MORROW, AND YET AT THE SAME TIME FINDING THAT THERE WAS A CONSIDERATION TO SUPPORT THE PROMISSORY NOTE AS TO HER CO-MAKER, THE DEFENDANT, YOST, INASMUCH AS THE DEFENDANTS IN THEIR ANSWER HAD ADMITTED THE EXECUTION AND DELIVERY OF SAID NOTE FOR A GOOD AND VALUABLE CONSIDERATION.

In his complaint the Plaintiff alleged, among other things, in Paragraph II that:

> ". . . for a valuable consideration the defendants, C. A. Butcher and Alberta G. Morrow . . . made, executed and delivered to the plaintiff their certain promissory note in writing . . ." (R. 3).

By their Answer the Defendants, C. A. Butcher and Alberta G. Morrow, in Paragraph I thereof admitted the allegations contained in the above quote from Paragraph II of Plaintiff's Complaint (R. 18). The law is well settled that a party is bound by the admissions made in his pleadings and that proof of facts so admitted by the pleadings is unnecessary and that such admissions are sufficient to invalidate a verdict or a finding which contradicts them. The law, as above quoted, is recognized in the Federal Courts in the State of Idaho and in all jurisdictions where any utterance thereon can be found:

Order of Railway Conductors v. Jones, 239 P. 882 (Colo.);

Russell v. Dilley, 159 N.W. 189 (Iowa);

Miller v. Advance Transp. Co., 126 Fed. 2d 442;

Commissioner of Internal Revenue v. New York Life Ins. Co., 65 F. 2d 347;

Mary E. Smiley v. John W. Smiley, 269 Pac. 589;

Dressler v. Johnston, 21 P. 2d 969, 131 Cal. App. 690;

Weed v. Idaho Copper Co., 10 P. 2d 613, 51 Idaho 737;

Peterson v. Universal Automobile Ins. Co., 20 P. 2d 1016, 53 Idaho 11;

Liberty Nat. Bank of Weatherford v. Semkoff, 84 P. 2d 438, 184 Okl. 18;

Wasatch Livestock Loan Co. v. Lewis & Sharp, 35 P. 2d 835, 84 Utah 347.

The rule is stated in 71 *Corpus Juris Secundum,* Pleading, Section 59, pages 147, 148, 149, 150, 151, 152, as follows:

"As a general rule, sometimes by virtue of statutory provisions, the parties to an action are judicially concluded and, likewise, under the decisions, are judicially bound by their pleadings therein, and unless withdrawn, altered, or stricken by amendment or otherwise, as discussed infra §64, the allegations, statements, or admissions contained in a pleading are conclusive as against the pleader, and are admissible as against the party making them or his successor in the litigation as proof of the facts which they admit on any subsequent trial of the case, or on the trial of another action, as discussed in Evidence §301 et seq. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings, and that the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action, whether

> or not they are offered as evidence. So admissions in the pleadings may render proof of the admitted facts unnecessary or render proof contradicting them inadmissible, and if countervailing evidence, either through inadvertence or the tacit consent of the parties, is admitted it is entitled to no consideration, as discussed infra §523. The admissions in a pleading may support a finding or a verdict in conformity therewith, or make a case for the jury, or invalidate a verdict or a finding which contradicts them."

It is at once apparent from an examination of the pleadings that the Defendants have by their pleadings specifically admitted the execution and delivery of the note in question for a valuable consideration and a careful examination of the trial pleadings including the cross-complaint of the Defendants discloses that they have not in any other allegation negatived this admission. Although the Defendants did set up certain matters by way of cross-complaint, they did, nevertheless, specifically admit the receipt of the money given as consideration for the promissory note in question and by their cross-complaint acknowledged that the amount paid as sufficient consideration was an offset against their alleged claim. If we concede, therefore, for the sake of argument that the evidence in the record discloses even a suggestion of lack of consideration that, in view of the well settled law with respect to admissions and pleadings, hereinbefore set forth, the trial Court was nevertheless in error in making a finding contrary to the admission in the Defendants' pleading to the effect that the Appellee, Al-

berta G. Morrow, executed and delivered the note in question without consideration.

The reason for the rule above set forth is very apparent and fundamental to the basic rules requiring pleadings. The purpose of requiring pleadings is to apprise each party of the contentions of the other that will be asserted at the trial. The instant case is a classic example of the necessity for the rule. An examination of the evidence in the record discloses a pleading in answer to the suit on the note and mortgage admitting their execution and delivery for a good and valuable consideration and setting up no matter in avoidance. The evidence then discloses an effort to avoid the note and mortgage on the part of the Appellee, Morrow, after having, by her pleading, admitted her execution and delivery of the same for a valuable consideration. Under such circumstances it is difficult even with timely objection to keep evidence out of the record that might tend to prove some defense precluded by the pleading, but nevertheless, harbored in the mind of the Appellee. It is for that reason that the pleadings and admissions thereon will, under the law, prevail over evidence to the contrary that may find its way into the record. It is, furthermore, worthy of mention in passing, that the requirements of Rule 8-C of the Rules of Civil Procedure provides as follows:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud,

> illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

An examination of the Defendants' pleadings discloses that if, and we do not concede this to be true, the Defendants had gotten evidence into the record establishing lack of consideration as to the Appellee, Morrow, or any other defense that insofar as the promissory note is concerned they have not properly pleaded any of the defenses enumerated in Rule 8-C or any other matter in avoidance so as to entitle them to offer proof of those matters and, that in any event, the admissions in their Answer are binding upon them notwithstanding any evidence that might be in the record to the contrary and that they are binding upon the Court in the entry of his findings of fact upon which the judgment of dismissal as against the Appellee, Morrow, was based.

In view of the admissions in the Defendants' pleadings, therefore, it is obvious that regardless of the evidence the Court erred in making its finding of fact to the effect that the Appellee, Morrow, did not receive a consideration for the note and in entering his judgment of dismissal as to the Appellee, Morrow, thereon, and that in view of the admissions in the pleadings

with respect to the promissory note and mortgage that the Court could not have found that the Appellee, Morrow, had established any defense by any matter in avoidance.

C. THE TRIAL COURT MAY NOT DISREGARD POSITIVE UNCONTRADICTED EVIDENCE SUSCEPTIBLE OF CONTRADICTION BY AN AVAILABLE WITNESS.

The law is well settled that a Court may not disregard positive uncontradicted evidence:

Pierstorff v. Gray's Auto Shop, 58 Ida. 438, 73 P. 2d 171;

First Trust & Savings Bank v. Randall, 58 Ida. 705, 89 P. 2d 741;

Idaho Times Publishing Company v. Industrial Accident Board, 63 Ida. 720, 126 P. 2d 573;

In re Odberg's Estate, 67 Ida. 447, 182 P. 2d 945;

Alabama Title & Trust Co. v. Millsap, 71 Fed. 2d 518;

Mutual Life Ins. Co. v. Sargent, 51 Fed. 2d 4;

Gibson v. Southern Pac. Co., 67 Fed. 2d 758;

Weicker v. Bromfield, 34 Fed. 2d 377.

In the instant case the evidence is uncontradicted that the note was made, executed and delivered by the Defendant, Butcher and the Appellee, Morrow. The evidence is positive and is uncontradicted that the Plaintiff paid to one of the co-makers, the Defendant, Butcher, the sum of Seven Thousand Three Hundred ($7,300.00) Dollars in money as a valuable considera-

tion for the execution and delivery of the note in question. Upon that state of the evidence, particularly in view of the fact that no matter was pleaded or proved in avoidance of the note, the trial Court erred in finding that the note was without consideration and in entering a judgment of dismissal as to the Appellee, Morrow.

CONCLUSION.

In conclusion, we wish to point out that the only matter that might constitute a defense in any way, shape or form that has been injected into this Cause is fraud and misrepresentation alleged in the affirmative defense and Cross-Complaint which was, as a matter of fact, pleaded for the purpose of the Defendants' counterclaim and although related to was nevertheless independent of the promissory note here in question. In any event, it is indeed significant that in the findings of fact (Finding XI, R. 179) the Court specifically found the fact to be that the Defendant, Butcher, was not induced to enter into the feeding contract by any fraud on the part of the Plaintiff and Appellant the only issue of fraud injected into the cause by the pleadings and the evidence related to the feeding contract set forth in the Cross-Complaint of the Defendants and the very same Cross-Complaint (R. 21, Paragraph 9) acknowledged the execution and delivery of the promissory note for a valuable consideration and acknowledged that it was and should be a valid offset against the matters

alleged in their Cross-Complaint. Their Cross-Complaint having failed, the execution and delivery of the promissory note for a valuable consideration still stands as admitted by the Defendants.

By reason of the well settled law, as herein set forth, the pleadings and admissions therein contained and the undisputed evidence as well as the finding of fact of the trial Court with respect to the note being support by a valuable consideration with respect to the Defendant, Butcher, and the finding of lack of fraud, we respectfully urge that the trial Court erred in finding that the note was without a valuable consideration with respect to the Appellee, Morrow, and entering a Judgment of Dismissal as to the Appellee, Morrow.

Dated, Weiser, Idaho,
September 10, 1958.

Respectfully submitted,
DONART & DONART,
Attorneys for Appellant.

(Appendix of Exhibits Follows.)

Appendix.

Appendix of Exhibits

Exhibit	Page of Record
Plaintiff's Exhibit No. 1 Promissory Note	
Identified	42
Offered	42
Received	43
Plaintiff's Exhibit No. 2 Mortgage	
Identified	42
Offered	42
Received	43
Plaintiff's Exhibit No. 3 Check $800.00	
Identified	43
Offered	43
Received	46
Plaintiff's Exhibit No. 4 Check $6,500.00	
Identified	43
Offered	43
Received	46
Plaintiff's Exhibit No. 5 Letters	
Identified	48
Offered	48
Received	48
Defendant's Exhibit No. 6 Contract	
Identified	50
Offered	56
Received	56
Defendant's Exhibit No. 7 Checks	
Identified	113
Offered	113
Received	114
Plaintiff's Exhibit No. 8 Weight Record	
Identified	141-142
Offered	153
Received	153
Plaintiff's Exhibit No. 9 Weight Record	
Identified	142
Offered	153
Received	153

Exhibit	Page of Record
Plaintiff's Exhibit No. 10 Sales Slip	
Identified	143
Offered	153
Received	153
Plaintiff's Exhibit No. 11 Adding Machine Tape	
Identified	143
Offered	153
Received	153
Plaintiff's Exhibit No. 12 Weight Slip	
Identified	143
Offered	153
Received	153
Plaintiff's Exhibit No. 13 Demand	
Identified	161
Offered	162
Received	163
Plaintiff's Exhibit No. 5 (1) Letter	
Identified	162
Offered	163
Received	163
Defendant's Exhibit No. 14	
Identified	163
Offered	163
Received	163

No. 15,998

United States Court of Appeals

For the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

APPELLEE'S BRIEF.

WM. R. PADGETT,
P. O. Box 2561, Boise, Idaho,
Attorney for Appellee.

FILED
OCT 27 1958
PAUL P. O'BRIEN, CLERK

Subject Index

Page

Statement of the case 1

Argument 2

I.

Even if it is conceded that, as stated in appellant's brief, the law in Idaho and in every other jurisdiction is well settled that where a consideration passes to one co-maker of a promissory note, such consideration is sufficient to support the obligation of the other co-maker, the trial court committed no reversible error in finding that there was a lack of consideration for the promissory note in question as to appellee Morrow and in dismissing the case as to her 2

II.

"The trial court may not disregard positive uncontradicted evidence susceptible of contradiction by an available witness" 3

Conclusion 5

Table of Authorities Cited

Cases

Pages

Central Bank of Bingham v. Perkins, 251 P. 627, 42 Idaho 310 3

First National Bank v. Godwin, 47 P. 2d 116 5

Goodman v. Goodman, 187 N.E. 777, 127 Ohio St. 223 5

Rommel Bros. v. Clark, 74 S.W. 2d 933, 255 Ky. 554 5

Strother v. Wilkinson, 216 P. 436, 90 Okla. 247 5

Tressler v. Whitsett, 12 S.W. 2d 723, 321 Mo. 849 5

Statutes

Negotiable Instruments Law, Idaho:

Idaho Code, Section 27-206 2

Idaho Code, Section 27-408 5

Idaho Code, Section 27-801 5

No. 15,998

United States Court of Appeals

For the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

This was an action brought by appellant to foreclose a Chattel Mortgage executed by appellee and one C. A. Butcher, or, in the alternative, to obtain a judgment on a note secured by the Chattel Mortgage.

Appellee admitted execution of the note and mortgage in the Answer but evidence adduced at the trial indicated that the only reason for obtaining appellee's signature on the note and mortgage was the fact that she owned the land upon which the feed was grown and for no other reason. (R. 52, 60 and 61.) It further appears from the record that appellant did not, at any time, discuss any phase of the transaction with appellee and, more specifically, did not obtain appellee's permission to dissipate the feed which was the subject of the Chattel Mortgage. (R. 52, 60 and 61.)

At the close of the plaintiff's case a motion was made for dismissal of the action as to appellee on two grounds: (1) that no consideration passed to appellee, (2) that appellant permitted the security to be dissipated without the consent of appellee.

ARGUMENT.

I.

EVEN IF IT IS CONCEDED THAT, AS STATED IN APPELLANT'S BRIEF, THE LAW IN IDAHO AND IN EVERY OTHER JURISDICTION IS WELL SETTLED THAT WHERE A CONSIDERATION PASSES TO ONE CO-MAKER OF A PROMISSORY NOTE, SUCH CONSIDERATION IS SUFFICIENT TO SUPPORT THE OBLIGATION OF THE OTHER CO-MAKER, THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN FINDING THAT THERE WAS A LACK OF CONSIDERATION FOR THE PROMISSORY NOTE IN QUESTION AS TO APPELLEE MORROW AND IN DISMISSING THE CASE AS TO HER.

It seems to be the position of appellant that appellee should be held liable on the note as an accommodation maker. It is the position of appellee that she was not an accommodation maker as defined by the law in Idaho or elsewhere.

The Negotiable Instruments Law as adopted in Idaho reads as follows:

Section 27-206 Idaho Code—

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

On page 11 of appellant's brief the case of *Central Bank of Bingham v. Perkins,* 251 P. 627, 42 Idaho 310, is cited in support of appellant's position. This case defines an accommodation maker as follows:

> "* * * He was an accommodation maker; he signed the note without any consideration moving to himself *with the intention of lending his credit* to the promoters of the mine."

The key phrase in the above definitions is *"with the intention of lending his name (or credit)."* It is obvious from the testimony of both appellant (R. 52, 60 and 61) and appellee (R. 135, 136 and 137) that appellee was asked to sign the note and mortgage solely because she owned the land upon which the feed was stored and upon which the cattle were to be fed and appellant did not want her to run them off the land.

The testimony clearly shows that it was not the intention of any of the parties that appellee was being asked to lend her name or credit to Defendant Butcher.

II.

"THE TRIAL COURT MAY NOT DISREGARD POSITIVE UNCONTRADICTED EVIDENCE SUSCEPTIBLE OF CONTRADICTION BY AN AVAILABLE WITNESS."

Appellee heartily agrees with the above statement set forth on page 21 of appellant's brief. The evidence is positive and uncontradicted that appellee executed the note and mortgage. In fact, appellee, in her answer and in her testimony, admits the execution of the note and mortgage.

The evidence shows positively that the reason appellee signed both the note and mortgage was that she was the owner of the land and appellant wished to prevent appellee from running him off the land with his cattle during the performance of the feeding contract.

The Record at page 137 reads as follows:

> "The Court. They told you. Now, you own the property, and, in order to protect ourselves in the event you should decide to run us off the land, we would like your signature on it?
>
> A. Right."

The Record at page 52 reads as follows (testimony of James R. Yost):

> "Q. And did you discuss the making of this note and mortgage with her?
>
> A. No, sir, I did not. I merely requested her signature to be put on the note, if I——
>
> Q. You requested that of her personally?
>
> A. No, I did not. I asked Mr. Butcher.
>
> Q. And did you request Mr. Butcher to have that done because Mrs. Morrow owned the land?
>
> A. There wasn't sufficient security; I felt there wasn't sufficient security.
>
> Q. Just answer the question. Did you ask her to put that on there because she owned the land?
>
> A. Yes, I did."

Not only is the evidence of this fact positive and uncontradicted, appellant admits that it is true. Therefore, we submit that it was not the intention of any of the parties to the transaction that appellee was to be liable on the note as co-maker, joint maker, accommodation party or in any other capacity.

III.

Even if it is conceded, which it is not, that appellee were an accommodation party on the note, she was properly dismissed from the action on the grounds that the appellant released the security without appellee's consent.

Section 27-408, Idaho Code;
Section 27-801, Idaho Code;
Strother v. Wilkinson, 216 P. 436, 90 Okla. 247;
First National Bank v. Godwin, 47 P. 2d 116;
Goodman v. Goodman, 187 N.E. 777, 127 Ohio St. 223;
Tressler v. Whitsett, 12 S.W. 2d 723, 321 Mo. 849;
Rommel Bros. v. Clark, 74 S.W. 2d 933, 255 Ky. 554.

CONCLUSION.

We submit that by reason of the law and the evidence above set forth that the Honorable Trial Court committed no reversible error in entering a Judgment of Dismissal as to the Appellee Morrow. We ask that the Judgment of Dismissal be affirmed.

Dated, Boise, Idaho,
October 20, 1958.

Respectfully submitted,
WM. R. PADGETT,
Attorney for Appellee.

No. 15,998

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES R. YOST,
Appellant,

vs.

ALBERTA G. MORROW,
Appellee.

REPLY BRIEF OF APPELLANT.

DONART & DONART,
Idaho First National Bank Building,
Weiser, Idaho,
Attorneys for Appellant.

FILE
NOV 20 1958
PAUL P. O'BRIEN, C

Subject Index

Page

Opening statement 1

Argument 2

I.

Even if we concede, which we do not, that the appellee Morrow is now in a position to assert that the appellant permitted the security to be dissipated without the consent of the appellee it is nevertheless at once apparent that could not work an extinguishment of the debt as contemplated by Section 120 of the Uniform Negotiable Instruments Act, Section 27-801, Idaho Code 2

II.

Even if it be conceded for the sake of argument that this could be a proper case for invoking the defense of the law of suretyship that the appellee Morrow was discharged by release of security it was nevertheless incumbent upon the appellee Morrow to plead that defense and to carry the burden of proof of affirmatively showing suretyship and her lack of knowledge of the disposition being made of the mortgaged feed in question ... 8

III.

A defense of dissipation of security is waived unless raised by pleading or motion 10

IV.

In order to assert that release of security released the appellee Morrow it is necessary to show that the actions of the appellant legally effected a release and that if there was in legal effect a release of security that it was without the knowledge or content of the appellee Morrow 11

V.

Where a party possessed of knowledge of a particular matter does not produce the evidence thereof there is a presumption that the evidence if introduced would be adverse to such party 13

Table of Authorities Cited

Cases

	Pages
Coeur d'Alene Lead v. Kingsbury, 85 Pacific (2d) 691 (Idaho)	13
Edmonston v. Ascough, 95 Pacific 313	5
Lyon v. Melgard, 163 Pacific (2d) 1019 (Idaho)	13
McLaughlin's Store v. Copeman, 294 Pacific 523, 50 Idaho 214	7
Merchants National Bank of Billings v. Smith, 196 Pacific 523, 15 A.L.R. 437	3, 6
Milner Bank & Trust Company v. Whipple's Estate, 156 Pacific 1098	7, 9
Redfield v. Wells, 173 Pacific 640, 31 Idaho 415	7
Rennie v. J. I. Case Threshing Machine Company, 220 Pacific 626	10
State Ex Rel Good v. Boyle, 186 Pacific (2d) 859 (Idaho)	13

Rules

Federal Rules of Civil Practice and Procedure, Rule 12-h	10, 11
Federal Rules of Civil Procedure, Rule 8-C	8

Statutes

Negotiable Instruments Law:	
Section 119	3
Section 119, subsection 4	4
Uniform Negotiable Instruments Act:	
Section 120 (Idaho Code, Section 27-801)	2, 3

Texts

10 C.J.S., Bills and Notes:	
Section 37, page 462	8
Section 37-E, page 464	6
Section 476-C, page 1039, footnotes 1 and 2	4
11 C.J.S., Section 663, page 111, Bills and Notes	9

No. 15,998

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

REPLY BRIEF OF APPELLANT.

OPENING STATEMENT.

Inasmuch as the Appellee has in her brief raised new matter that was not pleaded and upon which no Finding of Fact or Conclusion of Law was based, we will reply at greater length than would ordinarily be the case.

The Appellee asserts that the Appellee Morrow was not a co-maker, joint-maker or accommodation-maker of the note in question. It is also asserted that the Appellee Morrow was properly dismissed from the action on the ground that the Appellant released the security without the consent of the Appellee Morrow. The latter contention was not pleaded nor was any Finding of Fact or Conclusion of Law submitted or entered in support of this contention. It is significant

that the Appellee's contention that she received no consideration and was not a co-maker, joint-maker or accommodation-maker is inconsistent with her own admission in her pleadings which, as we have discussed in our opening brief, is binding upon the Appellee. We refer to Proposition B of the Argument set forth in our opening brief (pp. 16-21). With the observation that the Appellee Morrow's admission that she made, executed and delivered the note in question for a valuable consideration would establish her liability at least as a joint-maker, co-maker or accommodation-maker.

We will address ourselves to the contention of the Appellee Morrow that the Appellant permitted the security to be dissipated without the consent of the Appellee Morrow.

ARGUMENT.

I.

EVEN IF WE CONCEDE, WHICH WE DO NOT, THAT THE APPELLEE MORROW IS NOW IN A POSITION TO ASSERT THAT THE APPELLANT PERMITTED THE SECURITY TO BE DISSIPATED WITHOUT THE CONSENT OF THE APPELLEE IT IS NEVERTHELESS AT ONCE APPARENT THAT COULD NOT WORK AN EXTINGUISHMENT OF THE DEBT AS CONTEMPLATED BY SECTION 120 OF THE UNIFORM NEGOTIABLE INSTRUMENTS ACT, SECTION 27-801, IDAHO CODE.

From an examination of the authorities it is at once apparent that the only kind of act on the part of the Appellant that could have discharged the Appellee Morrow under the Negotiable Instruments Law would have been an act that would have discharged both the

Appellee Morrow and the defendant Butcher; in other words, an act which would have discharged the entire obligation under the note. The Idaho Code, Section 27-801, cited by the Appellee in her brief, which is identical to Section 119 of the Negotiable Instruments Law, provides as follows:

"27-801. How instrument discharged. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.

2. By payment in due course by the party accommodated where the instrument is made or accepted for accommodation.

3. By the intentional cancelation thereof by the holder.

4. By any other act which will discharge a simple contract for the payment of money.

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

Apparently the Appellee fails to distinguish between an *endorser* and a *maker*. Insofar as a maker of a note is concerned, one can only be released if the act of the holder is such that it would discharge the entire obligation. This proposition is discussed at length by the Supreme Court of Montana in the case of *Merchants National Bank of Billings v. Smith,* 196 Pacific 523, 15 A.L.R. 437. In that case the Court was dealing with Section 119 of the Negotiable Instruments Law which is identical with Section 27-801, Idaho Code above quoted. At page 525 the Court dis-

cusses the situation here contended for by Appellee as follows:

> "But appellant contends that he is released by virtue of the provisions of subdivision 4 of this section, for if the note in question were a simple contract, the release of the securities by the bank would operate to discharge him. Section 119 relates only to the discharge of the instrument and not to the discharge of the parties, though the greater includes the less, and it never was the law that the release of a surety or accommodation maker discharged the instrument itself. Richards v. Bank, above.
>
> The meaning of subdivision 4 is apparent. Anything which will discharge, that is, destroy, a simple contract—literally blot it out of existence in contemplation of law—will discharge an accommodation maker, but it will also release the principal debtor, and all other parties liable thereon."

The statement of the Court seems to be in accord with the text authorities. See 10 C.J.S., page 1039, Section 476-C, Footnotes 1 and 2, subject, Bills and Notes.

From the foregoing authorities as well as a literal reading of Subsection 4 of Section 119 of the Negotiable Instruments Law it is obvious that the Appellee Morrow cannot be discharged from her liability by any alleged release of security by the Appellant. The Appellee Morrow was a maker of the note in question and was, therefore, primarily liable. Section 119 of the Negotiable Instruments Law cited by the Appellee in her brief and hereinbefore set forth is the only

section relating to discharge that could have any bearing on the instant case inasmuch as the Appellee Morrow is a maker of the note. A careful examination of that section of the Negotiable Instruments Law at once discloses that it relates to discharge of the instrument and not makers or endorsers.

We are not unmindful of the law with respect to persons secondarily liable and that in such a case defenses under the law of suretyship may be involved which, among other things, might permit the assertion of the defense in this case that the security had been released if in fact that were the case, which we do not concede. Such a defense under the law of suretyship can only be asserted by an *endorser* or a person secondarily liable. It does not apply to a maker even though it be established as between the accommodation-maker and his co-maker there existed the relationship of principal and surety. The law in this respect is very ably discussed by the Supreme Court of Colorado in the case of *Edmonston v. Ascough,* reported in 95 Pacific 313. In that case one maker of a note signed the note and placed after his signature the word "surety". After suit was commenced he sought to invoke defenses under the law of suretyship but was precluded by reason of the fact that he was a maker and not an endorser. The Court discusses the contention of the surety at page 314 as follows:

> "It is assumed that prefixing the word 'surety' to his signature brought him within the rules or regulations touching indorsers or guarantors of negotiable paper. But in this regard counsel are mistaken. The word 'surety' did not change the

nature of appellant's liability. His signature was attached at the time the instrument was made and before its delivery. It was written on the face of the note and below the name of the principal maker. If appellant did not actually participate in the consideration we are satisfied from the evidence that he nevertheless intended to assume the responsibility of a joint maker. We do not consider what the effect would have been under our negotiable instrument law, had appellant's name been indorsed in blank on the back of the instrument."

The law as above-stated is supported by text authority. It is stated in 10 C.J.S., page 464, Section 37-E, Bills and Notes, as follows:

"Makers may occupy the relation of principal and surety between themselves, but nevertheless be all principals as to the payee or the holder; and the holder is ordinarily not affected by agreements between the makers as to their respective liability. However, one may show, as against a payee not a holder in due course, that he signed only as a surety."

We are likewise aware that it might be contended that the Appellant as payee is not a holder in due course and we are aware that there is a split of authority as to whether or not a payee may be a holder in due course. Again we cite *Merchants National Bank of Billings v. Smith, et al.,* supra. In that case the Court after discussing and analyzing the several sections bearing upon this question, concludes on page 528 as follows:

"It seems necessary, in order to harmonize the several provisions of the act, to hold that the

> complete definition of 'negotiated' is contained in the first sentence of section 30, and that a payee who has taken a note, complete and regular upon its face, before it was overdue, and for value and in good faith, may qualify as a holder in due course and prima facie is such."

This is likewise the rule in Idaho. This case has twice been cited by the Supreme Court of Idaho and our Court has twice held that a payee of a negotiable instrument may become a holder thereof in due course under the provisions of the Negotiable Instruments Law.

Redfield v. Wells, 173 Pacific 640, 31 Idaho 415;

McLaughlin's Store v. Copeman, 294 Pacific 523, 50 Idaho 214.

It is elementary, of course, that one signing on the face of the note such as this is a maker. The law is clearly stated in the case of *Milner Bank & Trust Company v. Whipple's Estate,* by the Supreme Court of Colorado reported in 156 Pacific 1098. In that case the executors of one of the makers whose name appeared on the face of the note contended that that co-maker was a surety. The Court after holding that the executors had the burden of proof to sustain the contention that the maker was a surety held that the maker was liable as a joint maker. We quote from the syllabus of the Court:

> "One signing an instrument reciting that on demand 'we promise to pay' a sum stated, with interest, is liable as a joint maker."

The rule as there stated is likewise supported by text authority. See 10 C.J.S., page 462, Bills and Notes, Section 37.

II.

EVEN IF IT BE CONCEDED FOR THE SAKE OF ARGUMENT THAT THIS COULD BE A PROPER CASE FOR INVOKING THE DEFENSE OF THE LAW OF SURETYSHIP THAT THE APPELLEE MORROW WAS DISCHARGED BY RELEASE OF SECURITY IT WAS NEVERTHELESS INCUMBENT UPON THE APPELLEE MORROW TO PLEAD THAT DEFENSE AND TO CARRY THE BURDEN OF PROOF OF AFFIRMATIVELY SHOWING SURETYSHIP AND HER LACK OF KNOWLEDGE OF THE DISPOSITION BEING MADE OF THE MORTGAGED FEED IN QUESTION.

It is elementary that the burden of pleading the defense now asserted by the Appellee Morrow was upon her under the Federal Rules of Civil Procedure. Rule 8-C of the Rules of Civil Procedure provides as follows:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servants, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

In view of the foregoing rule and in view of the further fact that the Appellee Morrow by her Answer admitted the execution and delivery of the note in question for a valuable consideration, she is not now in a position to assert for the first time that she was discharged by release of security. The execution of the note for a valuable consideration is completely inconsistent with the idea that she stood in the relation of surety to the defendant Butcher and as we have heretofore seen the Appellee could only assert this defense if she did stand in the relationship of surety to the defendant Butcher.

It is equally true that the Appellee Morrow had the burden affirmatively of proving the defense now asserted. The rule is stated in 11 Corpus Juris Secundum, page 111, subject, Bills and Notes, Section 663:

> "The burden of proving his defense is on a party to commercial paper who claims that he was released from liability thereon, or discharged by operation of law, as by an extension of time to the party primarily liable, or by negligence of the holder in failing to realize on securities;"

The rule as stated in Corpus Juris Secundum is amply supported by the case authorities. In the case of *Milner Bank and Trust Company v. Whipple's Estate,* supra, the executors of a deceased maker of a note contended that the deceased was only a surety and that she had been discharged. In that case the Court held that the burden of proof was on the executors and for failure to meet that burden the estate

of the decedent was held liable. The rule is stated in the syllabus of that case as follows:

> "Where plaintiff filed a claim against the estate of a decedent as the maker of a note, her executors, who contended that she was only a surety and that she had been discharged, have the burden of proof."

It is significant that this rule is recognized even in jurisdictions which hold that a payee is not a holder in due course and that a note is subject to the same defenses as if non-negotiable. See *Rennie v. J. I. Case Threshing Machine Company,* 220 Pacific 626. In that case the defendant was sued on a promissory note. By his Answer the defendant asserted certain defenses. The Supreme Court of Oklahoma at page 627 stated the rule as follows:

> "The effect of defendant's answer was to admit the execution of the notes and the amount sued for thereon, in the event the jury should find the issues of fact against the defendant on his answer. The burden was on the defendant to establish his defense by a preponderance of testimony."

III.

A DEFENSE OF DISSIPATION OF SECURITY IS WAIVED UNLESS RAISED BY PLEADING OR MOTION.

Rule 12-h, Federal Rules of Civil Practice and Procedure.

Section 12-h of the Federal Rules of Civil Practice and Procedure reads as follows:

> "Waiver of defenses. A party waives all defenses and objections which he does not present either

by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except . . ."

Clearly under this rule if any such defense as the Appellee is now contending for with respect to the fact that the mortgaged hay was fed by her co-defendant ever existed it was waived by her failure to raise it either by her Answer or by some appropriate Motion. It does not come within any of the exceptions in said Rule 12-h.

IV.

IN ORDER TO ASSERT THAT RELEASE OF SECURITY RELEASED THE APPELLEE MORROW IT IS NECESSARY TO SHOW THAT THE ACTIONS OF THE APPELLANT LEGALLY EFFECTED A RELEASE AND THAT IF THERE WAS IN LEGAL EFFECT A RELEASE OF SECURITY THAT IT WAS WITHOUT THE KNOWLEDGE OR CONSENT OF THE APPELLEE MORROW.

As has heretofore been pointed out, the only kind of release that can release the accommodation maker, co-maker or joint maker is such a release as would in legal effect extinguish the entire instrument. Even if we concede, which we do not, that a co-maker or accommodation maker may be released by acts of the payee, namely, by releasing the security, we find no

case cited by the Appellee which states that the feeding of mortgaged feed by one of the makers of a note constitutes a release of security that would release either the maker of the note or the accommodation maker. We have made an exhaustive search and find no cases which hold that the legal effect of allowing one maker of a note to be discharged or released by reason of the feeding of mortgaged feed by the other maker of the note. As a matter of fact it is significant that in the instant case the profits realized by the defendant Butcher under his feeding contract pursuant to which the mortgaged feed was fed was credited by the Appellant on the note.

Again, if we concede for the sake of argument that feeding the mortgaged feed by the defendant Butcher could work to legally effect a release of the accommodation maker, the Appellee Morrow, it was nevertheless incumbent upon the Appellee Morrow at the trial to plead and prove not only the now asserted release of security but also that such release of security was without the knowledge or the consent of the Appellee Morrow. From the record it cannot be assumed or inferred that the Appellee Morrow did not have knowledge or give her consent. When we consider the amount of money involved and that the fact of knowledge and consent would be within her knowledge and yet she remained silent we cannot logically conclude that she did not have knowledge or that she did not give her consent. On the contrary had she in fact not had knowledge nor had she given her consent it is obvious that such lack of knowledge and lack of consent would not only have been pleaded and proved but

by her asserted with great vehemence. We emphasize the necessity for a showing by the Appellee of a lack of knowledge and lack of consent because all of the cases cited by the Appellee in her brief, even those that are the most favorable to her position, have one thing in common that is lacking here, namely, that in each case the release of security was without the knowledge and without the consent of the accommodation maker.

V.

WHERE A PARTY POSSESSED OF KNOWLEDGE OF A PARTICULAR MATTER DOES NOT PRODUCE THE EVIDENCE THEREOF THERE IS A PRESUMPTION THAT THE EVIDENCE IF INTRODUCED WOULD BE ADVERSE TO SUCH PARTY.

Coeur d'Alene Lead v. Kingsbury, 85 Pacific (2d) 691 (Idaho);

State Ex Rel Good v. Boyle, 186 Pacific (2d) 859 (Idaho);

Lyon v. Melgard, 163 Pacific (2d) 1019 (Idaho).

The Appellee complains that the hay in question was fed out to her co-defendant's livestock. She did not testify as to whether her co-defendant, who was her son-in-law, told her about the contract he had with the Appellant for feeding livestock and that the hay in question was to be fed to these livestock under the terms of the written contract in evidence in this case. Neither did she testify as to whether or not she consented to such arrangement. This evidence was peculiarly within her knowledge and consequently her failure to testify creates a presumption that the evi-

dence if furnished would have been detrimental to her. It is hardly to be conceived that she would have signed a note for more than Eight Thousand Dollars even for her son-in-law without ascertaining the reason he wanted the money and what arrangement he had for repaying the note.

In conclusion we direct attention to the fact that the Findings of Fact and Conclusions of Law are silent with respect to the Appellee's present contention that she is discharged by a release of security. We furthermore direct attention to the fact that the Findings of Fact and Conclusions of Law justify the dismissal as to the Appellee Morrow solely upon the ground of lack of consideration. It is furthermore significant that the Appellee Morrow in her Answer admitted that she made, executed and delivered the note in question for a good and valuable consideration. As to the necessity for pleading the defense now asserted and the effect of admissions made in the pleadings we merely direct attention to Proposition B appearing in our opening brief on pages 16 through 20.

Summarized the Appellant's contentions are:

That the Appellee was an accommodation maker;

That by the pleadings she admitted she executed the note for a valuable consideration;

That the Appellee did not plead the defense of release of security (if such is a defense);

That the cases cited by the Appellee upon the question of release of security were all cases where the holder of the note released a mortgage or other lien

securing the payment of a note *without the knowledge or consent of the accommodation maker;*

That in the instant case the Appellant did not release any security;

That there is no evidence that the Appellee did not know or consent to the feeding of this hay by her co-defendant;

That her failure to testify as to whether she had knowledge of or had given consent to such feeding raises a presumption that if she had so testified the evidence would have been detrimental to her.

That the Appellee was a maker as distinguished from an endorser; that she could only be released by acts which would release and discharge the entire instrument as to both parties; that under the law of Idaho the Appellant payee was a holder in due course; that being primarily liable on the note as a maker the defense recognized under the law of suretyship of release of security was not available to the payee; that she did not in any event undertake to plead or prove the defense now asserted.

We respectfully urge, therefore, that the Appellee Morrow should not have been released and that the trial Court was in error in dismissing the action as to the Appellee Morrow.

Dated, Weiser, Idaho,
November 18, 1958.

Respectfully submitted,
DONART & DONART,
Attorneys for Appellant.

No. 15999

United States Court of Appeals

for the Ninth Circuit

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Eastern Division.

FILED

JUN 20 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-13-58

No. 15999

United States
Court of Appeals
for the Ninth Circuit

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Eastern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-13-58

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 17

Answer to Request for Admissions, Filed August 20, 1957 28

Answer to Request for Admissions, Filed November 12, 1957 31

Attorneys, Names and Addresses of 1

Bond for Costs on Appeal 45

Certificate of Clerk 151

Complaint, Amended 11

Findings of Fact and Conclusions of Law 38

Interrogatories and Answers to Interrogatories 31

Judgment 44

Motion to Amend 14

Motion to Dismiss 16

Motion Re Exhibits 158

Stipulation Re 159

Notice of Appeal 45

Order of Removal 10

INDEX PAGE

Petition for Removal 3
Ex. A—Summons 6
B—Complaint 7

Record of Hearing, May 2, 1957 17

Request for Admissions, Plaintiff's, Filed February 26, 1957 23

Request for Admissions, Plaintiff's, Filed August 14, 1957 26

Request for Admission, Plaintiff's, Filed October 4, 1957 29

Response to Request for Admissions 25

Statement of Points, Appellant's 154

Stipulation to Amend the Amended Complaint by Interlineation 15
Order Re 16

Transcript of Proceedings 47

Witnesses:

Bates, Daniel H.
—direct 83, 148
—cross 84

Franks, Robert D. (Deposition)
—direct 111

Fritcher, James T.
—direct 79

INDEX PAGE

Witnesses—(Continued):

Nelson, Beatrice
—direct 55, 150
—cross 65
—redirect 76

Peterson, H. Dean
—direct 100, 103
—cross 53

Riley, Leonard (Deposition)
—direct 133

Smith, Stanley
—direct 86
—cross 94

NAMES AND ADDRESSES OF ATTORNEYS

L. CHARLES JOHNSON,
Carlson Building,
Pocatello, Idaho;

GEORGE R. PHILLIPS,
Ross-Davis Building,
Pocatello, Idaho,

Attorneys for Appellant.

J. F. MARTIN,
C. BEN MARTIN,
P. O. Box 2184,
309 Idaho Building,
Boise, Idaho,

Attorneys for Appellee.

In the United States District Court in and for the District of Idaho, Eastern Division

Civil No. 2012

BEATRICE NELSON,

Plaintiff,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Defendant.

PETITION FOR REMOVAL

The petition of New Hampshire Fire Insurance Company, the above-named defendant, respectfully alleges:

I.

That this petitioner is a corporation organized and existing under and by virtue of the laws of the State of New Hampshire.

II.

That the above-entitled action has been filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, and is now pending therein.

III.

That service of Summons and Complaint in the above-entitled action was made upon your petitioner on the 10th day of January, 1957, a copy of the Summons in said action being attached hereto, marked "Exhibit A" and made a part hereof, and

a copy of the Complaint in said action being also attached hereto, marked "Exhibit B" and made a part hereof, and that no other process or pleading has been served upon your petitioner.

IV.

That this is a civil action and, as shown by said Complaint, the sum or amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

V.

That the action and controversy which forms the basis for the said action is between residents and citizens of different states, that-is-to-say, the plaintiff herein is a resident and citizen of the State of Idaho residing at American Falls, Power County, therein, and the defendant is a corporation organized and existing under and by virtue of the laws of the State of New Hampshire.

VI.

That said action is now pending in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock and thirty days have not elapsed since the service of said Summons and Complaint upon this defendant and this defendant has not answered or appeared in the action filed in said District Court for Bannock County.

VII.

That your petitioner desires the removal of this cause to the United States District Court in and for

the District of Idaho, Eastern Division, the District and Division within which this case is now pending.

VIII.

Your petitioner herewith files, with this petition, a bond with good and sufficient surety to pay all costs and disbursements incurred by the plaintiff by reason of these removal proceedings should it be held that this case was not lawfully and properly removed to the United States District Court.

Wherefore, New Hampshire Fire Insurance Company, your petitioner herein, prays that upon filing this petition and bond in the United States District Court in and for the District of Idaho, Eastern Division, and upon filing a copy of this petition in the office of the Clerk of the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock, that the said District Court in and for the County of Bannock proceed no further therein except to make an Order of Removal of said cause to the United States District Court in and for the District of Idaho, Eastern Division.

J. F. MARTIN,
C. BEN MARTIN,

By /s/ C. BEN MARTIN,
Attorneys for Defendant.

EXHIBIT A

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

No. 19826

BEATRICE NELSON,

Plaintiff,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Defendant.

SUMMONS

The State of Idaho Sends Greetings to the Above-Named Defendant:

You are hereby notified, that a complaint has been filed against you in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock by the above-named plaintiff and you are hereby directed to appear and plead to said complaint within twenty days of the service of this Summons; and you are further notified that unless you so appear and plead to said complaint within the time herein specified, the plaintiff will take judgment against you as prayed in said complaint.

Witness my hand and the seal of said District Court this 7th day of January, 1957.

SARAH DEVANEY,
Clerk;

By TWYLA L. STONE,
Deputy.

EXHIBIT B

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

BEATRICE NELSON,

Plaintiff,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Defendant.

COMPLAINT

Comes now Beatrice Nelson, and for cause of action against the defendant complains and alleges:

1.

That at all times hereinafter mentioned, the defendant is an insurance corporation duly authorized to do business in the State of Idaho by having complied with the laws of the State of Idaho.

2.

That the defendant is organized under the laws of another state than the State of Idaho.

3.

That on the 12th day of June, 1956, the defendant, New Hampshire Fire Insurance Company, issued a policy to the plaintiff insuring a certain trailer home, Serial No. 6955, against loss from fire and lightning, and that said trailer home was insured to

protect the plaintiff from loss in an amount not to exceed $5000.00; and that the value of said trailer home on said June 12, 1956, was $6000.00

4.

That the defendant has a copy of the insurance policy in its possession and it would be useless and idle ceremony to attach a copy to this Complaint. That said insurance policy was countersigned on June 12th, 1956, by one H. Dean Peterson, an authorized agent of defendant, and was so countersigned and issued and the contract completed in the County of Bannock, State of Idaho; and the said policy will be produced at the trial as evidence.

5.

That the trailer home covered by said policy, issued by said defendant, was a 1956 Supreme Trailer Home, 46 feet long, Serial No. 6955, and on the 23rd day of September, 1956, and immediately prior to the damage hereinafter indicated, the said trailer home had a value of $5,895.00.

6.

That on the 23rd day of September, 1956, at American Falls, Idaho, said trailer home was damaged by fire, and depreciated, and after said fire the defendant hired as its agents certain adjusters and said adjusters, S. S. Smith and General Adjustment Bureau, Inc., did secure four bids of purchase and the high bid was $1,267.50, and said $1,267.50 was the reasonable value of said trailer home immediately after said fire.

7.

That the plaintiff has complied with all of the terms and provisions of said policy which it is incumbent upon her to so do.

8.

That the plaintiff has made demand upon the defendant for such sums as are due because of the damages incurred to the trailer home from said fire and the defendant has neglected or refused to pay to the plaintiff any sum whatsoever.

9.

That the defendant has obligated the plaintiff to obtain services of legal counsel to prosecute this action and she has obtained the service of the law firm of Johnson and Olson, duly licensed and practicing attorneys in the State of Idaho, and she has promised to pay to them a reasonable fee for their services, and such reasonable fee being $1,500.00 or more, and defendant is required to pay such fee to plaintiff pursuant to Section 41-1403, Idaho Code.

Wherefore, the plaintiff prays judgment of $4,627.50, costs of suit, and that she be awarded in addition a reasonable attorney fee of $1,500.00 by the Court, pursuant to Section 41-1403, Idaho Code, and to such other and further relief as to the Court may seem just.

JOHNSON AND OLSON,
By L. CHARLES JOHNSON,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed February 1, 1957.

[Title of District Court and Cause.]

Civil No. 19826

ORDER OF REMOVAL

It appearing to the Court that the defendant in the above-entitled action did, on the day of February, 1957, make a Special Appearance herein for the purpose of filing and presenting a copy of Petition for Removal of said cause to the United States District Court in and for the District of Idaho, Eastern Division, that a copy of said Petition and Bond for the removal of same, together with a copy of Notice showing service thereof on the above-named plaintiff, have been filed herein and the Court being advised in the premises,

Now, Therefore, It Is Hereby Ordered:

I.

That the above-entitled cause be, and it is hereby, removed to the United States District Court in and for the District of Idaho, Eastern Division, pursuant to the petition and the statutes in such cases made and provided.

II.

That all further proceedings in this Court, in the above-entitled action, are hereby stayed until ten days after said action or any issue therein is remanded by said United States District Court in the event that said action or any issue involved therein is so remanded by said Court.

III.

That the Clerk of this Court make certified copies of the records and proceedings herein for transmission to the United States District Court, as required by law.

Dated this 4th day of February, 1957.

DARWIN D. BROWN,
District Judge.

[Endorsed]: Filed February 4, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now Beatrice Nelson, and for cause of action against the Defendant complains and alleges:

I.

That at all times hereinafter mentioned, the Defendant is an insurance corporation duly authorized to do business in the State of Idaho by having complied with the laws of the State of Idaho.

II.

That the Defendant is organized under the laws of another State than the State of Idaho.

III.

That on or about May 17, 1956, Plaintiff purchased a 1956 Supreme Trailer House; forty-six (46) feet long, serial number 6955, and then took

possession of same and retained possession and lived in same until the fire hereafter alleged occurring September 23, 1956.

IV.

That on the 12th day of June, 1956, the Defendant, New Hampshire Fire Insurance Company, issued a policy to the Plaintiff insuring a certain trailer home, Serial No. 6955, against loss from fire and lightning, and that said trailer home was insured to protect the Plaintiff from loss in an amount not to exceed $5000.00.

V.

That at such time as the insurance took effect as hereinbefore alleged and at the time of the loss as hereinafter alleged, the Plaintiff had an insurable interest in the property insured.

VI.

That the value of said trailer home on said June 12, 1956, was $6000.00

VII.

That the Defendant has a copy of the insurance policy in its possession and it would be an idle ceremony to attach a copy to this Complaint; and the said policy will be produced as evidence.

VIII.

That said insurance policy was countersigned on June 12th, 1956, by one H. Dean Peterson, an authorized agent of Defendant, and was so countersigned and issued and the contract completed in the County of Bannock, State of Idaho.

IX.

That the trailer home covered by said policy, issued by said Defendant, was the same 1956 Supreme Trailer Home, 46 feet long, Serial No. 6955 purchased by the Plaintiff on May 17, 1956, and on the 23rd day of September, 1956, and immediately prior to the damage hereinafter indicated, the said trailer home had a value of $5,895.00.

X.

That on the 23rd day of September, 1956, at American Falls, Idaho, said trailer home was damaged by fire, and depreciated, and after said fire the Defendant hired as its agents certain adjusters and said adjusters, S. S. Smith and General Adjustment Bureau, Inc., did secure four bids of purchase and the high bid was $1,267.50, and said $1,267.50 was the reasonable value of said trailer home immediately after said fire.

XI.

That the Plaintiff has complied with all of the terms and provisions of said policy which it is incumbent upon her to so do.

XII.

That the Plaintiff has made demand upon the Defendant for such sums as are due because of the damages incurred to the trailer home from said fire and the Defendant has neglected or refused to pay to the Plaintiff any sum whatsoever.

XIII.

That the Defendant has obligated the Plaintiff to obtain services of legal counsel to prosecute this action and she has obtained the service of the law firm of Johnson and Olson, duly licensed and practicing attorneys in the State of Idaho, and she has promised to pay to them a reasonable fee for their services, and such reasonable fee being $1,500.00 or more, and Defendant is required to pay such fee to Plaintiff pursuant to Section 41-1403, Idaho Code.

Wherefore, the Plaintiff prays Judgment of $4,627.50, costs of suit, and that she be awarded in addition a reasonable attorney fee of $1,500.00 by the Court, pursuant to Section 41-1403, Idaho Code, and to such other and further relief as to the Court may seem just.

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Plaintiff.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed February 26, 1957.

[Title of District Court and Cause.]

MOTION TO AMEND

Comes Now the Plaintiff and moves the Court for leave to amend by interlineation by substituting in Paragraph IV a comma for the period and

by adding to said Paragraph IV the clause: "And such insurance was in full force and effect on the date of said loss hereinafter alleged."

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorney for the Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between the above-entitled parties, by and through their respective attorneys of record, that the plaintiff shall have leave to amend the Complaint on file herein in conformity with the Motion to Amend the Complaint heretofore filed, and that all pleadings and papers and proceedings in the cause running to the Amended Complaint on file shall run to the Amended Complaint as amended by interlineation when and if the Court grant permission to so amend.

J. F. MARTIN,
C. BEN MARTIN,

By /s/ C. BEN MARTIN,
Attorneys for Defendant.

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Plaintiff.

ORDER

It is so ordered this 4th day of November, 1957.

/s/ FRED M. TAYLOR,
U. S. District Judge.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant and moves this Court for an Order Dismissing the above-entitled cause upon the grounds and for the reasons that the Amended Complaint fails to state sufficient facts upon which relief could be granted as prayed for in the Amended Complaint.

J. F. MARTIN,
C. BEN MARTIN,

By /s/ J. F. MARTIN,
Attorneys for Defendant.

[Endorsed]: Filed March 13, 1957.

[Title of District Court and Cause.]

MINUTE ORDER—MAY 2, 1957

This matter came on regularly this date in open court for hearing on defendant's Motion to Dismiss and Objections to Admissions, L. Charles Johnson appearing as counsel for the plaintiff and C. Ben Martin appearing as counsel for the defendant.

After a discussion by counsel for the respective parties, counsel for the defendant withdrew his Objections to Admissions, and the Motion to Dismiss was overruled by the Court, and thereupon, the defendant was given 5 days to answer, and the matter was set for jury trial, Wednesday, May 15, 1957, at 10 o'clock a.m.

Judge Clark.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, New Hampshire Fire Insurance Company, and answering the Amended Complaint of the plaintiff on file herein admits, denies and alleges as follows, to-wit:

I.

This defendant denies each and every allegation, statement and fact contained in the Amended Complaint of the plaintiff except as the same is hereinafter specifically admitted.

II.

Specifically answering paragraphs I and II of the Amended Complaint, this defendant admits that it is a corporation and that it had, prior to the happening of any of the matters or things referred to in the Amended Complaint, complied with the Constitution and laws of the State of Idaho with reference to insurance companies carrying on or transacting business within the State of Idaho and in connection with paragraph II of the Amended Complaint, this defendant affirmatively states that it is a corporation organized and existing under and by virtue of the laws of the State of New Hampshire.

III.

Specifically answering paragraph III of the Amended Complaint, this answering defendant denies that the plaintiff herein, on May 17, 1956, or at any other time, purchased a 1956 Supreme Trailer House 46 feet long bearing Serial No. 6955 but, in this connection alleges that on said date, to-wit: May 17, 1956, said trailer house was the property of the Supreme Trailer Company of Bonham, Texas, and was being convoyed and transported by one Albert Pauls and one Joseph R. Roberts for delivery to the Aetna Trailer Sales of Boise, Idaho, and that when the said Albert Pauls and Joseph R. Roberts arrived at American Falls, Power County, Idaho, with said trailer house they, and each of them, wrongfully, unlawfully, and feloniously appropriated said trailer house to their own use and benefit and purported, under

their own names and signatures, to sell said trailer house to the plaintiff herein for the alleged sum of $2,000.00 and at said time gave and delivered to the plaintiff herein an alleged Bill of Sale to said trailer house under their own hands and signatures. That said trailer house or home above referred to was, by the said Albert Pauls and Joseph R. Roberts appropriated, stolen, and embezzled. That they had no right, title or interest therein, could not and did not convey title to said trailer house to the plaintiff, that the plaintiff did not ask for or receive and could not receive a lawful or legal Certificate of Title to said trailer house, as required by the laws of the State of Idaho, and that she neither had nor gained any right, title or interest nor the right of possession in or to said trailer house.

IV.

Specifically answering paragraphs IV and V of said Amended Complaint, this answering defendant admits that on June 12, 1956, it issued its policy of insurance to the plaintiff herein insuring the plaintiff against loss by fire and lightning in an amount not to exceed $5,000.00 but, in this connection, this defendant alleges that it issued its said insurance policy to the plaintiff herein upon the representation of the plaintiff that she was the sole and lawful owner of said trailer, all of which representation was false and untrue and known to the plaintiff to be false and untrue and that said policy was, by reason of said facts and

the laws of the State of Idaho, void of no force or effect from its inception and, in this connection, this defendant alleges that as soon as it ascertained the facts set forth in this Answer it tendered to the plaintiff the full insurance premium previously paid by her and that said tender has remained in effect and this defendant's check for said premium is and has been since the taking of the deposition of the plaintiff herein by this defendant, deposited with and now held by the Clerk of this Court.

V.

Specifically answering paragraphs VI, VII, VIII, and IX of the Amended Complaint, this answering defendant admits that on the 17th day of May, 1956, as well as on the 12th day of June, 1956, said trailer house had a retail value of between the sums of $5,895.00 and $6,000.00 and, in this connection, this defendant alleges that the plaintiff knew, at the time of the alleged purchase by her from the said Albert Pauls and Joseph R. Roberts of said trailer house for the alleged or asserted sum of $2,000.00 that the said trailer house had such value of approximately $6,000.00 and that common, ordinary care and prudence would have dictated to any reasonable, prudent person that said trailer house was embezzled and stolen and that the said Albert Pauls and Joseph R. Roberts were not, could not, and did not transfer any valid title whatsoever to said trailer house. This defendant further admits that its policy of insurance was

countersigned by its Agent, H. Dean Peterson, at Pocatello, Bannock County, Idaho.

VI.

Specifically answering paragraph X of the Amended Complaint, this defendant admits that a fire occurred in said trailer house on or about September 23, 1956, and that it was damaged and depreciated.

For a Further and Separate Defense to the Amended Complaint of the Plaintiff Herein, This Answering Defendant Alleges:

I.

That immediately upon the consummation of the purported sale of said trailer home to the plaintiff herein by the said Albert Pauls and Joseph R. Roberts, the said Pauls and Roberts, and each of them, left American Falls, Idaho, for parts unknown and that neither the defendant herein, the Supreme Trailer Company, or the Great American Indemnity Company have any knowledge or information as to the whereabouts of either Albert Pauls or Joseph R. Roberts and that immediately upon discovery by the Supreme Trailer Company of the embezzlement of said trailer house by the said Pauls and Roberts, it filed a criminal complaint against said individuals and there is now outstanding a Warrant of Arrest against said individuals which has not been served for the reason that the whereabouts of said Albert Pauls and Joseph R. Roberts are unknown.

II.

That the plaintiff herein neither requested nor received a Certificate of Title to said trailer house, as required by the laws of the State of Idaho and it was not until after the alleged fire in September, 1956, that either the Supreme Trailer Company or the Great American Indemnity Company had any information or knowledge as to the location or whereabouts of said trailer house referred to in plaintiff's Amended Complaint. That in the interim between May, 1956, and September, 1956, the Supreme Trailer Company made claim against the Great American Indemnity Company, who had written a Fidelity Bond on behalf of the said Pauls and Roberts, by reason of the embezzlement and theft of said trailer house and thereafter, and prior to September, 1956, the Great American Indemnity Company paid to the Supreme Trailer Company the loss so suffered and sustained by the Supreme Trailer Company by reason of said embezzlement and, thereupn, became subrogated to the rights of the Supreme Trailer Company. That after said fire occurred and discovery was made of the location of said trailer house by the said Great American Indemnity Company it made demand upon the plaintiff herein for the possession of said trailer house and this defendant is informed and believes and upon such information and belief alleges that the plaintiff herein, pursuant to said demand, did turn over and deliver to the Great American Indemnity Company said trailer house.

Wherefore, this answering defendant prays that the plaintiff take nothing by reason of her Amended Complaint and that this defendant have Judgment for its costs incurred herein and such other relief as this Court may deem just and equitable.

J. F. MARTIN,
C. BEN MARTIN,

By /s/ C. BEN MARTIN,
Attorneys for Plaintiff.

[Endorsed]: Filed June 27, 1957.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

To: New Hampshire Fire Insurance Company:

You Are Hereby Requested, within ten days after the service of this request upon you, which date is fixed by the returned Registered Mail Receipt, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. Q. Do you admit you are the Defendant in this lawsuit?

2. Q. Do you admit that you have an agent resident in Pocatello, Bannock County, State of Idaho; named H. Dean Peterson?

* * *

12. Q. Do you admit the value of the trailer house on which you issued Policy No. A 23-80-27 on or about June 12, 1956, had a value of approximately $6,000.00?

13. Q. Do you admit the trailer house had a value on or about September 22, 1956, of about $5,895.00?

14. Q. Do you admit the trailer house on which you issued Policy No. A 23-80-27 had a value on or about September 24, 1956, of not more than about $1,300.00?

15. Q. Do you admit the trailer house on which you issued Policy No. A 23-80-27 was damaged by fire during September, 1956, and prior to September 24, 1956?

* * *

Dated this 25th day of February, 1957.

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed February 26, 1957.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

To: Beatrice Nelson, the above-entitled plaintiff, and to Johnson and Olson, Pocatello, Idaho, her attorneys.

State of California,
County of San Francisco—ss.

Miley H. Rodgers, Secretary of the above-entitled defendant company, makes admissions, denials, or objections as indicated in the appropriate "Answer" space on the original "Request for Admissions" which was mailed to the defendant's attorneys, as follows:

The defendant admits Requests for Admissions Nos. 1, 2, 12, 13, 14, and 15, and denies Request for Admissions No. 22.

The defendant cannot truthfully either admit or deny Request for Admissions Nos. 10 and 11 because the defendant has no knowledge whatever thereof and, therefore, defendant denies Nos. 10 and 11.

The defendant objects to Request for Admissions Nos. 3, 4, 5, 6, 8, 16, 17, 18, 19, 20, 21 and 23 upon the grounds (a) that the same are irrelevant to any issue and (b) that the same are not proper Requests for Admissions but, rather, should be submitted, if material and relevant, as Interrogatories, and defendant objects to No. 7 for the reasons set

forth in (a) and (b) hereinabove and for the additional reason that the same is not attached to the Request for Admissions nor has it been exhibited to this defendant, and defendant objects to No. 9 for the reasons set forth in (a) and (b) hereinabove and for the additional reason that no document is attached to the Request for Admissions served upon the attorneys for this defendant.

/s/ MILEY H. RODGERS.

Subscribed and sworn to before me this 29th day of March, 1957.

[Seal] /s/ HELEN J. THIEL,
Notary Public for California.

My Commission Expires June 5, 1959.

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

To: New Hampshire Fire Insurance Company:

You Are Hereby Requested, within twenty days after the service of this request upon you, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. Q. Do you admit New Hampshire Fire Insurance Company did issue an insurance policy on

or about June 12, 1956, to Beatrice Nelson, insuring against loss from fire a certain trailer house, 1956 Supreme No. 6955?

2. Q. Do you admit Defendant, New Hampshire Fire Insurance Company, did have an agent during the year 1956 engaged in the sale of insurance policies?

3. Q. Do you admit that H. Dean Peterson, during the year 1956, was licensed to sell insurance in the State of Idaho for New Hampshire Fire Insurance Company, the Defendant herein?

4. Q. Do you admit that your Company, by and through its agent, H. Dean Peterson, issued policy number A 23-80-27 to Beatrice Nelson, the Plaintiff herein, on or about June 12, 1956?

5. Q. Do you admit that Beatrice Nelson had paid to the Defendant, New Hampshire Fire Insurance Company, a premium on policy number A 23-80-27?

6. Q. Do you admit that premium or premiums paid by Beatrice Nelson during 1956 were sufficient so that the premium on said policy number A 23-80-27 was paid in advance covering the period from June 12, 1956, to September 30, 1956, inclusive?

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Plaintiff.

[Endorsed]: Filed August 14, 1957.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

Comes Now the defendant and in reply to the request for admissions to the six interrogatories submitted either answer or object thereto, as follows:

To interrogatory No. 1:

A. This defendant admits its Agent issued what purported to be its insurance policy to Beatrice Nelson but denies that said policy had any force or effect or ever was valid or enforceable or that any liability exists on the part of the defendant by reason thereof.

To interrogatory No. 2.

A. Yes.

To interrogatory No. 3.

A. Yes.

To interrogatory No. 4.

A. We admit H. Dean Peterson prepared and delivered an insurance policy to Beatrice Nelson but contend that said policy had no force or effect and that said Beatrice Nelson had no insurable interest in the property alleged to be or sought to be insured.

To interrogatory No. 5.

A. We admit that Beatrice Nelson paid to the agent H. Dean Peterson a premium but, in this connection state that upon ascertaining the facts

in connection with the issuance of this policy and of the noninsurability of Beatrice Nelson in the property alleged to have been covered, we tendered back to the said Beatrice Nelson the said premium, which tender is now with the Clerk of this Court.

To interrogatory No. 6.

A. No.

J. F. MARTIN,
C. BEN MARTIN,

By /s/ J. F. MARTIN,
Attorneys for Defendant.

[Endorsed]: Filed August 20, 1957.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

To: New Hampshire Fire Insurance Company, the above-named defendant:

You Are Hereby Requested, within ten (10) days after the service of this Request upon you, through your attorney, to make the following admissions for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

1. That each of the following documents, a photostatic copy of each with typed signatures exhibited with this request, is genuine.

* * *

(b) A letter dated November 3, 1956, on the stationery of the General Adjustment Bureau, Inc., addressed to Mr. L. Charles Johnson, and bearing the ink and typewritten signature of S. S. Smith, Branch Manager.

2. That each of the following statements is true.

* * *

(c) That the defendant mailed the original of said letter to Johnson and Olson, attorneys at law, Carlson Building, Pocatello, Idaho.

* * *

(h) At all times in the Complaint mentioned you had an agent resident in Pocatello, Bannock County, State of Idaho named H. Dean Peterson.

(i) That this agent, H. Dean Peterson, countersigned insurance policy number A 23-80-27.

* * *

Dated this second day of October, 1957.

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

To: Beatrice Nelson, the above-entitled plaintiff, and to Johnson & Olson, her attorneys of record.

Answering the request for admissions served upon this defendant, this answering defendant submits the following answers:

1. That each of the following documents, a photostatic copy of each with typed signatures exhibited with this request, is genuine.

* * *

(b) Answer: Yes.

2. That each of the following statements is true.

(c) Answer: Yes.

* * *

(h) Answer: Yes.

(i) Answer: Yes.

/s/ M. H. RODGERS.

Duly verified.

[Endorsed]: Filed November 12, 1957.

[Title of District Court and Cause.]

INTERROGATORIES AND ANSWER TO INTERROGATORIES

The defendant New Hampshire Fire Insurance Company now answers the interrogatories submitted by the plaintiff herein and for answer thereto states:

Interrogatory No. 1—Is M. H. Rodgers an officer of your company?

Answer: Yes.

Interrogatory No. 2—What is his title?

Answer: Secretary.

Interrogatory No. 3—What was his title on November 2, 1956?

Answer: Secretary.

Interrogatory No. 4—Was he an officer of your company during September, 1956?

Answer: Yes.

Interrogatory No 5—What was his title during September, 1956?

Answer: Secretary.

Interrogatory No. 6—Did M. H. Rodgers, an officer of your company, send a letter to Johnson and Olson under date of November 2, 1956, touching on policy number: A 23-80-27 and on insured by name of Nelson?

Answer: Yes.

Interrogatory No. 7—Detail completely the contents of such letter.

Answer: A copy of that letter is hereunto attached and in explanation thereof I desire to state that while the letter purports to be dictated by myself, it was in fact dictated by J. J. Smith, an adjuster in our office in San Francisco, but I am not attempting to avoid or repudiate any statement

made in the letter merely by reason of the fact that Mr. Smith wrote it. The actual facts are that at the time this letter was written we did not have the information which was later developed; namely, (a), that this trailer has been embezzled by Albert Pauls and Joseph Roberts, and particularly Joseph Roberts, because as we understand it, Supreme Trailer Company has no idea yet as to who Albert Pauls is; (b) that Beatrice Nelson came into possession of this house trailer by paying these two men $2,000.00 for it and that these men then embezzled the $2,000.00 from the Supreme Trailer Company; (c) that Beatrice Nelson did not obtain a bill of sale from the Supreme Trailer Company nor did she have a certificate of title to the trailer. All of these facts were developed later by our Idaho attorneys, and when the facts were developed, we tendered back to Beatrice Nelson the full premium which she paid us. Had we known at the time this policy was written of the above facts and that Beatrice Nelson had no right, title, claim or interest in or to this trailer, we would not have written this policy.

Interrogatory No. 8—Is the signature of such letter that of an officer of your corporation?

Answer: The photostat of the letter which you refer to in Interrogatories Nos. 8 and 9 bears a typewritten name "M. H. Rodgers" and it is impossible to answer 8 or 9 because no signature shows. We are attaching this photostat to these answers for the purpose of showing that no signature appears.

Interrogatory No. 9—Was a letter under date of November 2, 1956, bearing the letterhead "The New Hampshire Group" and the signature in ink "M. H. Rodgers," and the typed signature "M. H. Rogers Secretary" sent to Johnson and Olson by you and in the words and figures as the photostatic copy attached to Request for Admissions served on you this date?

Answer: This interrogatory is answered in interrogatory No. 8.

Interrogatory No. 10—Was such letter sent by you through your corporate agent to Johnson and Olson regarding the fire insurance claim of Beatrice Nelson, the plaintiff?

Answer: Yes.

Interrogatory No. 11—Is the signature on the original of such letter a genuine signature of an officer of your corporation?

Answer: I refer back to the answer to Interrogatory No. 8 and to the photostatic copy of the letter, because no signature appears thereon and the original of the letter has not been submitted to us for inspection.

Interrogatory No. 12—Was the letter under date of November 2, 1956, from M. H. Rodgers, an officer of your corporation, to Johnson and Olson, a letter sent in the normal course of the business of your corporation regarding a claim by Beatrice Nelson?

Answer: Yes.

Interrogatory No. 13—Was the true market value of the trailer house Supreme 6955, involved in this

lawsuit, on or about September 22, 1957, immediately preceding the fire causing damage, about $5,895.00?

Answer: We have no way whatsoever of answering this question. We did not see the trailer and neither then nor now know anything about it.

Interrogatory No. 14—Was the true market value of the trailer house, Supreme 6955, involved in this lawsuit, on or about September 24, 1956, immediately after the damage by said fire not more than $1,300.00.

Answer: Again, we know nothing whatsoever about the value of the trailer after the alleged fire. All we know is that we were informed by the General Adjustment Bureau, Inc., at Pocatello, Idaho, that the highest bid that they were able to receive was $1,300.00.

Interrogatory No. 15—Is the letter under date of November 2, 1956, a photostatic copy of which was attached to the Request for Admissions served on you this date, a letter bearing the signature of an officer of your corporation?

Answer: Again, we must refer to our answer to Interrogatory No. 8 for the reason that the photostatic copy shows no signature, but as we have said, Mr. Rodgers did send a letter to Johnson and Olson under the date of November 2, 1956, and we firmly believe that the photostatic copy is a copy of the letter which was sent by Mr. Rodgers out of the San Francisco office.

Interrogatory No. 16—Was such letter sent by your corporation to the attorneys for Beatrice Nelson regarding her claim for fire damage on a house trailer?

Answer: Yes.

Interrogatory No. 17—Would the premium paid by Beatrice Nelson, on policy A 23-80-27, covering Supreme trailer 6955, have been sufficient in amount had it not been tendered back to plaintiff so that the policy would have been otherwise in full force and effect on the date of the fire damage, to wit: September 24, 1956, had there been an insurable interest in said Beatrice Nelson both at the time that the policy was issued and at the time of the damage caused by fire?

Answer: If you mean by this question that had Beatrice Nelson had an insurable interest in this trailer at the time the policy was issued and at the time the loss occurred, then the answer is that the premium which she paid and which was later tendered back was sufficient to pay for the policy as issued.

Interrogatory No. 18—During the entire year 1956 and at present is Bryan and Company at Pocatello, Bannock County, Idaho, one of your Idaho agents?

Answer: The answer to this question is no, but we do not want to mislead anyone by this statement because corporations are not licensed in Idaho to write insurance. The licenses are issued in the names of individuals who may be connected in some manner with the corporations.

Interrogatory No. 19—Detail specifically the authority of such agent Bryan and Company and whether or not this authority existed during the entire year 1956.

Answer: As stated above, Bryan and Company was not an agent of this defendant in 1956 or at any other time, and it had no authority whatsoever to either act for or on behalf of this defendant.

Interrogatory No. 20—Detail specifically the authority of General Adjustment Bureau and S. S. Smith as your agents.

Answer: In this particular case S. S. Smith, who was the Branch Manager of the General Adjustment Bureau, Inc., at Pocatello, Idaho, at the time the loss occurred in this particular case was employed by this defendant to investigate the loss and report his findings to this defendant. That was the extent of his authority and the authority of General Adjustment Bureau, Inc.

Signature and endorsement on Interrogatories:

JOHNSON & OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Plaintiff.

[Endorsed]: Filed October 4, 1957.

Signature and endorsement on Answers to Interrogatories:

By /s/ M. H. RODGERS.

[Endorsed]: Filed November 12, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard before the Court, on November 23, 1957, the parties to this action having waived a trial by Jury, plaintiff being represented by L. Charles Johnson, of the law firm of Johnson & Olson, and the defendant being represented by C. Ben Martin, of the law firm of J. F. Martin and C. Ben Martin. Testimony, both oral and documentary, having been introduced and the parties having presented Briefs to the Court and submitted the cause for consideration and decision, and the Court, being fully advised in the premises, now makes and files the following Findings of Fact and Conclusions of Law.

Findings of Fact

The Court finds:

I.

That the plaintiff was at the time of the filing of the complaint, and for a long time prior thereto had been, a citizen of the State of Idaho, residing at American Falls, in said state.

II.

That the defendant is and at the time of the filing of the complaint was and for a long period of time prior thereto had been a corporation organized and existing under and by virtue of the laws of the State of New Hampshire and was organized for the pur-

pose, among other things, of writing policies of fire insurance and that prior to any of the matters and things referred to herein had complied with the Constitution and the laws of the State of Idaho with reference to foreign corporations doing business within said State.

III.

That on May 17, 1956, the Supreme Trailer Company, of Bonham, Texas, was the owner of a 1956 Supreme Trailer House, being 46 feet in length, with Serial No. 6955, and that, at said time, said trailer house was in the possession of one Joseph Roberts, an employee of the Supreme Trailer Company and Southwest Mobile Homes Sales Corporation for the purpose of delivering said trailer house to the Aetna Trailer Sales Company at Boise, Idaho, the latter having contracted with the Supreme Trailer Company and Southwest Mobile Homes Sales Corporation to purchase the same and it was being delivered in harmony with such agreement to purchase. That on the said May 17, 1956, there was with the said Joseph Roberts a certain Albert Pauls, the latter being unknown to the officials of either Supreme Trailer Company or Southwest Mobile Homes Sales Corporation and that he had no connection whatever with either of the last two mentioned companies.

IV.

That en route from Bonham, Texas, to American Falls, Idaho, the trailer house above referred to was slightly damaged, said damage being minimal and not affecting the value thereof.

V.

That for approximately six months prior to May 17, 1956, the plaintiff herein had been in the market for a trailer house, had made numerous inquiries as to makes and prices thereof and, on May 17, 1956, was fully conversant with the prices and values of trailer houses.

VI.

That on or about May 17, 1956, the said Joseph Roberts and Albert Pauls arrived in American Falls, Idaho with said trailer house. That while in American Falls they met the plaintiff herein, Beatrice Nelson, and negotiated with her for the sale and purchase of said trailer house and purported to sell said trailer house to the plaintiff for the sum of $2,000.00, the plaintiff giving her check to the said Roberts and Pauls and the said Roberts and Pauls executing a Bill of Sale from themselves to the plaintiff herein. That said Bill of Sale did not purport to be a Bill of Sale from the Supreme Trailer Company or Southwest Mobile Homes Sales Corporation and neither the said Roberts nor Pauls had any right, title or interest in said trailer house or any right to sell or dispose of the same and that the plaintiff knew or by the exercise of any degree of care or caution should have known that neither the said Roberts nor the said Pauls had any right, title or interest in or to said trailer house or any right to sell or dispose of the same and that the plaintiff herein was not an innocent purchaser of said trailer house or a purchaser for value. That, at the time of said purported sale and delivery to the plaintiff

herein of said trailer house, the wholesale value of said trailer house was $4,276.70 and it had a retail value of approximately $5,895.00.

VII.

That the plaintiff, at no time, made any inquiry of the Supreme Trailer Company or Southwest Mobile Homes Sales Corporation as to the authority of the said Roberts and Pauls to sell said trailer house nor did she ever receive from either of the latter, a Certificate of Sale enabling her to obtain from the State of Idaho, a Certificate of Title thereto, as required by the laws of the State of Idaho.

VIII.

That on or about June 12, 1956, the plaintiff herein applied to the defendant, by and through its local agent at Pocatello, Idaho, for a policy of insurance for $5,000.00, covering the loss by fire or theft, on said trailer house but neither at that time nor at any other time did she disclose to the defendant the circumstances surrounding the purported purchase by her of the trailer house nor the price paid therefor by her. That the policy of insurance was issued by the defendant herein in ignorance of the facts and circumstances surrounding the purported purchase of said trailer house.

IX.

That at the time the plaintiff applied for and procured said policy of insurance, she had no insurable interest in said trailer house.

X.

That thereafter, and on or about September 23, 1956, a fire occurred in said trailer house, damaging the same and reducing the value thereof to approximately $1,200.00. That plaintiff made Proof of Loss to the defendant and the defendant, upon investigating the facts and circumstances surrounding the purported purchase of the trailer house by the plaintiff denied liability under its policy and tendered back to the plaintiff the premium she had previously paid.

XI.

That the plaintiff had no insurable interest in said trailer house at the time of the occurrence of the fire and has no claim whatsoever upon or against the defendant by reason of said insurance policy.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes, as a matter of law:

I.

That the purported sale of the trailer house from Joseph Roberts and Albert Pauls to the plaintiff, on May 17, 1956, was utterly void and that the plaintiff gained no right, title or interest in or to said trailer house by reason of said purported sale.

II.

That the plaintiff had no insurable interest in said trailer house at the time of the issuance and

delivery to her of the insurance policy issued by the defendant herein.

III.

That the plaintiff had no insurable interest in the trailer house at the time of its damage or destruction by fire on or about September 23, 1956.

IV.

That the defendant has no liability whatsoever to the plaintiff by reason of the issuance, by it, to the plaintiff of its policy of insurance.

V.

That the plaintiff is not entitled to recover from the defendant any sum whatsoever.

VI.

That the defendant is entitled to Judgment against the plaintiff for its costs incurred herein.

Done and dated in open Court this 17th day of February, 1958.

/s/ FRED M. TAYLOR,
U. S. District Judge.

Lodged February 11, 1958.

[Endorsed]: Filed February 17, 1958.

In the United States District Court in and for the District of Idaho, Eastern Division

Civil No. 2012

BEATRICE NELSON,

Plaintiff,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Defendant.

JUDGMENT

This cause coming on regularly to be heard before the Court sitting without a Jury, and the Court being fully advised in the premises and having made and filed its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered and Adjudged, and this Does Order and Adjudge that the plaintiff take nothing from the defendant by virtue of her Amended Complaint and that the defendant have Judgment against the plaintiff for its costs incurred herein and taxed in the sum of $138.05.

Done and dated in open Court this 17th day of February, 1958.

/s/ FRED M. TAYLOR,
U. S. District Judge.

Lodged February 11, 1958.

[Endorsed]: Filed February 17, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Beatrice Nelson, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered and filed against her in this action on the seventeenth day of February, 1958, both the entire such Judgment and all parts thereof.

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,

/s/ GEORGE PHILLIPS,

Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 17, 1958.

———

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally are and acknowledge that we and our personal representatives, successors or assigns, are bound to pay to New Hampshire Fire Insurance Company, defendant, the sum of Two Hundred and Fifty and no/100 ($250.00) Dollars;

The condition of this bond is that, whereas the plaintiff has appealed to the United States Court of

Appeals for the Ninth Circuit by Notice of Appeal filed herewith on the same day as this bond, from the Judgment of this Court entered on or about February 17, 1958, if the plaintiff, below signed, shall pay all costs adjudged against her if the appeal is dismissed or the Judgment affirmed or such costs as the appellate Court may award if the Judgment is modified, then this bond is to be void, but if the plaintiff fails to perform these conditions or any one of them the payment of the amount of this bond shall be due forthwith.

/s/ BEATRICE NELSON,
Plaintiff.

[Seal]: UNITED STATES FIDELITY AND GUARANTY COMPANY,

By /s/ T. F. TERRELL,
Its Attorney in Fact
and Resident Agent.

Countersigned By:

/s/ T. F. TERRELL,
Agent, Pocatello, Idaho.

Beatrice Nelson signed and acknowledged the above Bond for Costs before me this fourteenth day of March, 1958.

[Seal] /s/ GERALD W. OLSON,
Notary Public in and for the
State of Idaho.

[Endorsed]: Filed March 17, 1958.

In the District Court of the United States in and for the District of Idaho, Eastern Division

No. 2012—E

BEATRICE NELSON,

Plaintiff,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Defendant.

November 23, 1957—10:00 A.M.

Appearances:

For the Plaintiff:
JOHNSON AND OLSON, By
L. CHARLES JOHSON,
Pocatello, Idaho.

For the Defendant:
MARTIN & MARTIN, By
C. BEN MARTIN,
Boise, Idaho.

The Clerk: Beatrice Nelson vs. New Hampshire Fire Insurance Company No. 2012 for trial.

The Court: Are you ready to proceed, gentlemen?

Mr. Martin: Yes, your Honor.

Mr. Johnson: Yes, your Honor.

The Court: You may proceed.

Mr. Johnson: If it please the Court, at this time, the Court has signed an order allowing an amendment by the Plaintiff, to paragraph 4. the interlineation reading: "That such insurance was in full

force and effect on the date of said loss hereinafter alleged." After a stipulation of counsel, could I see if that interlineation has been made, and if it has not, add that?

The Court: If it has not been made, it will be made. That is to the amended complaint?

Mr. Johnson: Yes, your Honor.

At this time, your Honor, we could call the Clerk. We want to put in the interrogatories and admissions in evidence. If counsel will stipulate, we are going to put in certain admissions and interrogatories, part of the official file.

Mr. Martin: Now, which ones do you have in mind, counsel?

Mr. Johnson: The request for the admission of Plaintiff, dated October 2, 1957.

Mr. Martin: Yes.

Mr. Johnson: The answer of defendant through M. H. Rogers, which was verified November 9, 1957, and filed November 12, 1957.

Mr. Martin: Yes, I will so stipulate.

Mr. Johnson: And the request of the plaintiff, filed in June, 1957, the request for admissions, filed June——

Mr. Martin: Which ones are those, the one you have sent me, or the ones dated in blank?

Mr. Johnson: The ones that you have an acknowledgement of service, dated in June.

Mr. Martin: Yes.

Mr. Johnson: And would counsel stipulate that this was received by him?

Mr. Martin: Yes.

Mr. Johnson: And we would like to put in evidence the answers to the request for admissions, which are undated.

The Court: What date were they filed?

Mr. Johnson: It would have been in June, 1957, the first answer that the defendant admitted the insurance policy to Beatrice Nelson, that it was in force. [5*]

Mr. Martin: Yes.

Mr. Johnson: And the request for the admissions, filed in February, 1957, by the plaintiff and which were served and filed in February, 1957.

Mr. Martin: About the 26th of February.

Mr. Johnson: In that vicinity, yes, 26th or 27th. The first interrogatory being, "Do you admit that you are the defendant in this lawsuit?"

Mr. Martin: Yes. May I inquire, your Honor, as to the date of the filing of the amended complaint in this matter?

The Court: It was filed February 26, 1957.

Mr. Martin: What date was the interrogatory, the request for the admission, "Do you admit that you are the defendant in this lawsuit"? I do not see that one, was that prior to the amended complaint or after?

Mr. Johnson: That was after.

The Court: That was February 26, 1957.

Mr. Johnson: Yes, it was filed after it.

Mr. Martin: If the Court please, was that filed prior or after the amended complaint?

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: Apparently on the same date. There is no way of determining which was filed first. I do not see how it would make any difference.

Mr. Martin: In that event, your Honor, I cannot [6] stipulate to the original for the reason it is not shown, or determined that the request for admissions were filed after the filing of an amended complaint, and if filed prior, they have no bearing on the matter, the amended complaint starts this matter entirely anew.

The Court: I don't see how it would make any difference.

Mr. Martin: I don't think it makes a great deal of difference.

Mr. Johnson: Would you stipulate to the admission of that?

Mr. Martin: Yes.

Mr. Johnson: Being the request for admissions, then, filed on the 26th day of February, and the response to the request which was sworn to on March 29, by M. H. Rogers, for the defendant?

Mr. Martin: Yes.

Mr. Johnson: The interrogatory of plaintiff of October 3, 1957?

Mr. Martin: October 3, 1957.

The Court: Your response that you were talking about on the 29th of March were filed on April 2, 1957.

Mr. Johnson: Thank you, your Honor. And the request for interrogatories, directed by the plaintiff to the defendant, dated October 3, 1957, served immediately [7] thereafter and filed?

Mr. Martin: Yes.

Mr. Johnson: And the answer to such interrogatory which were verified on November 9, and filed November 12, 1957?

Mr. Martin: Yes.

Mr. Johnson: We therefore offer the requests and the answers in evidence.

The Court: On the stipulation of counsel they will be considered admitted.

Mr. Johnson: At this time I see no reason to read the contents.

Mr. Martin: For the record, would the Court prefer that we mark those as exhibits in this cause?

The Court: If you have them sufficiently identified, it will not be necessary.

Mr. Johnson: At this time, with the stipulation of counsel, could we have the deposition you took broken open for the purpose of securing the exhibits that are in that?

Mr. Martin: Yes, I will agree to that. Will you agree that the deposition of Robert D. Franks and Leonard Riley be broken open for the purpose that the photostats of the invoice may be used?

Mr. Johnson: For examination?

Mr. Martin: Yes. [8]

Mr. Johnson: And the deposition of Beatrice Nelson.

The Court: They may be published.

Mr. Martin: I understand that the deposition of Beatrice Nelson and Leonard Riley are published.

The Court: Yes.

Mr. Johnson: May it now be stipulated by and

between counsel that the statement, purporting to be the——

The Court: Better mark them as exhibits and then identify them.

The Clerk: Being marked as Plaintiff's Exhibits Nos. 1 and 2. The Proof of Loss is No. 1, and the Amended Statement is No. 2.

(The documents referred to were marked Plaintiff's Exhibits Nos. 1 and 2 for identification.)

Mr. Johnson: Be it stipulated by and between counsel that Exhibit 1 and the sworn statement, signed on October 18, 1956, be admitted as Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2, both coming from the files of the defendant's attorney, and Plaintiff's Exhibit No. 1 was mailed to the defendant's attorney around October 18, 1956. Number 2 was mailed to the defendant on October 31, 1956.

Mr. Martin: I will agree, providing the stipulation be changed with respect to the mailing. I don't know [9] whether it was mailed or not. We did receive it.

Mr. Johnson: About that date?

Mr. Martin: In due course.

The Court: It may be admitted with that understanding.

(The documents referred to were marked Plaintiff's Exhibits No. 1 and No. 2 and were received in evidence.)

Mr. Johnson: At this time we would like to call Mr. Dean Peterson for cross-examination under Rule 43.

The Court: Very well.

H. DEAN PETERSON

a witness called on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Dean Peterson.

Cross-Examination

By Mr. Johnson:

Q. Would you state your full name, please?

A. I sign my name H. Dean Peterson. My full name is Harold Dean Peterson.

Q. And what was your position, or occupation, on or about June 12, 1956?

A. Insurance agent.

Q. For what company or companies?

A. For Bryan & Company, a local agency. [10]

Q. And were you an agent for the New Hampshire Fire Insurance Company? A. Yes.

Mr. Johnson: Would the Clerk mark this as Plaintiff's Exhibit No. 3 for identification, please?

The Clerk: Marked Plaintiff's Exhibit No. 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Johnson): Looking at Plaintiff's

(Testimony of H. Dean Peterson.)

Exhibit No. 3 for identification, would you state to the Court if that is your signature which appears on the bottom of the first page? A. It is.

Q. And is that your signature which appears upon the Endorsement thereto? A. It is.

Q. Are you familiar with this policy of insurance? A. Yes.

Q. Was it issued to Beatrice Nelson?

Mr. Martin: Now just a minute. Your Honor, we object to this type of questioning in that as we understand the rule calling for cross-examination under the statute, is for the purpose of getting information which is not [11] in the possession of the plaintiff and the plaintiff has not accessibility to that information. In this instance we believe the plaintiff can testify as to whether or not she received that or purchased and we object to this questioning.

The Court: I seriously doubt whether he comes in the category of a person subject to cross-examination under the Rule. Is there any question about the insurance policy?

Mr. Martin: No, your Honor, we will admit that that policy was issued to her.

The Court: Very well, offer it in evidence.

Mr. Johnson: We offer this in evidence.

The Court: If there is no objection it will be admitted. As I understand it, you are objecting to this man being subject to cross-examination under Rule 43?

(Testimony of H. Dean Peterson.)

(The document referred to was marked Plaintiff's Exhibit No. 3 and was received in evidence.)

Mr. Martin: That is correct, your Honor.

Mr. Johnson: Therefore, we have no further questions to ask him.

The Court: Very well. That is all, sir.

(The witness left the stand.)

Mr. Johnson: At this time we will call the Plaintiff, Beatrice Nelson. [12]

BEATRICE NELSON

plaintiff, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Beatrice Nelson.

Direct Examination

By Mr. Johnson:

Q. Would you state your full name, please?

A. Beatrice Nelson.

Q. Are you the plaintiff in this law suit?

A. Yes, sir.

Q. Did you come to purchase a trailer house in 1956? A. Yes, sir.

Q. Would you state to the Court the full details concerning that purchase?

(Testimony of Beatrice Nelson.)

Mr. Martin: We object to the generalization of the question, your Honor.

The Court: She may answer if she will fix the time.

The Witness: Explain the situation and everything that I——

Q. (By Mr. Johnson): Tell the Court everything concerning the purchase of that trailer that you remember. [13]

A. Well, Mr. Bates came to the coffee shop on the morning of the 17th and told me there was some men that had a trailer house that they wanted to sell. He knew I had been looking for one. I asked him where they were and he said at his place of business having breakfast. We had a cup of coffee and I got in his car and drove out to his place of business and picked up the men and went to look at the trailer. I examined the trailer and I asked these two gentlemen if they had the authority to sell it. They said that they did have and that they would go before a lawyer and draw up a Bill of Sale for me.

Mr. Bates, these two gentlemen, and I went over to the office of Mr. Loofburrow's, he drew up the Bill of Sale, went over to my place of business and I made the check out and paid them for it, and they went over to the bank and cashed the check and came back to my place of business and bought a couple of drinks and left.

Mr. Johnson: Would you mark this Plaintiff's Exhibit No. 4 for identification?

(Testimony of Beatrice Nelson.)

(The document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Johnson): Mrs. Nelson, handing you Plaintiff's Exhibit 4 for identification, is that the Bill of Sale that you received? [14]

A. Yes, sir.

Q. And was that subsequently recorded?

A. Yes, sir.

Q. And the recording details appear thereon?

A. Yes, sir.

Mr. Johnson: We now offer this as Plaintiff's Exhibit 4.

Mr. Martin: No objection, your Honor.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 4 and was received in evidence.)

Mr. Johnson: Would you mark this instrument as Plaintiff's Exhibit No. 5 for identification?

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Johnson): Mrs. Nelson, showing you Plaintiff's Exhibit No. 5 for identification, will you state to the Court if that is your name thereon?

A. Yes, sir.

Q. And is that the check which you gave to the two gentlemen? A. Yes, sir.

(Testimony of Beatrice Nelson.)

Q. And it eventually returned to you with your bank statement, is that correct? [15]

A. Yes, sir.

Mr. Johnson: We now offer Plaintiff's Exhibit 5 for identification in evidence as Plaintiff's Exhibit No. 5.

Mr. Martin: No objection, your Honor.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 5 and was received in evidence.)

Q. (By Mr. Johnson): At the time the gentlemen talked to you, did they have any papers in their possession? A. Yes, sir.

Q. Did you receive those papers from them?

A. Yes, sir.

Mr. Johnson: Would you mark this paper as Plaintiff's Exhibit 6 for identification, and this one as Plaintiff's Exhibit 7 for identification?

(The documents referred to were marked Plaintiff's Exhibits Nos. 6 and 7 for identification.)

Q. (By Mr. Johnson): Handing you Plaintiff's Exhibits 6 and 7, were those papers given to you by these gentlemen? A. Yes, sir.

The Court: You keep referring to the gentlemen——

Mr. Johnson: Yes; excuse me.

The Court: ——can we identify those gentlemen in [16] some way?

Q. (By Mr. Johnson): Were the names of those

(Testimony of Beatrice Nelson.)

gentlemen Albert Pauls and Joseph Roberts?

A. It was.

Q. That was their names? A. Yes, sir.

Q. And these were given to you by Albert Pauls and Joseph Roberts? A. Yes, sir.

Mr. Johnson: We now offer Plaintiff's Exhibits Nos. 6 and 7 for identification as Plaintiff's Exhibits Nos. 6 and 7 in evidence.

Mr. Martin: No objections.

The Court: Exhibits Nos. 6 and 7 may be admitted. I don't know what they are.

(The documents referred to were marked Plaintiff's Exhibits Nos. 6 and 7 and were received in evidence.)

Mr. Johnson: Number 6, your Honor, being an invoice, and No. 7 being the final inspection sheet of Supreme Trailer 6955.

Q. (By Mr. Johnson): Regarding this trailer after this date of May 17, 1956, would you explain to the Court what you did, if anything in the purchase of insurance? [17]

A. Well, I called Bryan & Bryan Company in Pocatello and told them that I had purchased the trailer house and would like to have it insured and they sent Mr. Peterson out, oh, in a couple of days.

Q. He was the man that just testified?

A. Yes.

Q. And what was said at that time, if anything, between you and Mr. Peterson?

A. In regards to the insurance?

Q. In relation—just relate to the Court the con-

(Testimony of Beatrice Nelson.)

versation that you had with Mr. Peterson.

A. Mr. Peterson came down there and I was at the club, and he came down and told me he had come down to write up the insurance and he asked me where the papers was on it and I told him they was up at the trailer house. We walked up and were going in and get them and he said, "Well, all I need is the serial number." And he got that right off the front of the trailer. And he asked me what valuation I wanted written up on it. I said, "Well, I don't know."

He said, "Well, it should be worth about $6,000."

And I said, "Well, I don't have near that much in it."

He said, "Well, we better write it for five, [18] anyway.

And I said, "Well, I don't have that much in it either." And I explained to him that it was going through with a convoy and these two gentlemen had wrecked the trailer and offered to sell it to me because it would be rejected when they got to Boise where they were taking it and they would have to trail it back to Texas. And they gave me a good—what I thought was a good buy on it—and so I had purchased it, and I told him the amount I had purchased it for.

He said, "Well, we better write the insurance for five-thousand." And he said, "When you get moved in it and get your furniture or whatever you are going to put in it." I told him I planned to put—on getting a television set and he said that we would estimate the furniture and fixtures and add a clause

(Testimony of Beatrice Nelson.)

covering those, which we never did get around to do, it burned before we ever did that.

Q. And then what happened, if anything, after he said that he would write up this other on the furniture?

A. Well, he just went on home and he wrote up the insurance and mailed it out to me a few days later, I don't just remember when, and I mailed them in a check for it—for $5,000 just on the trailer. The interior was never insured.

Q. And you mailed the check in to—— [19]

A. Bryan and Bryan.

Q. What happened after that—excuse me, Mrs. Nelson—would you state to the Court, after you purchased this trailer on May 17, when you moved into the trailer house itself?

A. Well, I think I had only been in it for about six weeks before it burned. There, on the trailer court they didn't have a place to put it on the sewer line. I was waiting for this man that owns the park to get a sewer line built to the trailer so I could move in it.

Q. And then you moved in about six weeks——

A. I'd say five or six weeks before it burned. I had been living in it about that long.

Q. And do you remember the date that fire occurred to this trailer house? A. Yes, sir.

Q. And what was that date?

A. September the 23rd.

Q. And would you explain to the Court what happened at that time, if anything, what you re-

(Testimony of Beatrice Nelson.)

member about the fire and what subsequently occurred?

A. Well, at the time of the fire I was out to my daughters, about sixteen miles out at Rockland. Her phone rang and she went to the phone and she said, "Mother, your trailer house is on fire." And we got her two little [20] youngsters and got in the car and drove to town and by the time we got in town, the fire was extinguished.

Q. What did you do then, if anything?

A. Called Bryan and Company and told them that my trailer house had burned up and I would like to have them come out and look at it and Mr. Peterson and Mr. Smith came out.

Q. Mr. Dean Peterson, the person that just testified here? A. That is right.

Q. Who is Mr. Smith?

A. He made me acquainted as Mr. Dan Smith, an adjuster.

Q. And then what happened, if anything?

A. Well, they examined the trailer, and if I remember rightly he said, "It looks like to me it's a total loss." That is about all that was said.

Q. What did Stan Smith say, if anything?

A. Well, he said, "It looks bad to me, too."

Q. And then what happened?

A. They left and went back to Pocatello.

Q. Do you remember what happened to your first Proof of Loss, if anything, was that denied or accepted? A. It was accepted.

(Testimony of Beatrice Nelson.)

Q. Excuse me, payment on the Proof of [21] Loss?

A. The payment, it was denied, the payment was denied.

Q. Do you remember when that was and when you first heard about that through——

A. The denial?

Q. Yes.

A. Oh, I can't remember the date—I can't remember the date but Mr. Peterson and Mr. Smith came down to my trailer and told me that it would be denied.

Q. Do you remember in what month that could have been?

A. Well, it was about December, I can't be sure.

Q. You say Mr. Peterson and Mr. Smith came down and told you there would be no payment?

A. Yes.

Q. And when you mentioned Mr. Bates, what is his first name? A. Dan Bates.

Q. And at that time where was he residing, do you know?

A. At the Sagebrush Inn, he was running the Sagebrush Inn.

Q. In American Falls?

A. Yes, well, just outside the city limits of American Falls. [22]

Q. After this fire loss occurred, what happened to the trailer house, if anything, how long did it remain where it was standing?

Mr. Martin: If the Court please, we object to

(Testimony of Beatrice Nelson.)

that as being irrelevant and immaterial.

The Court: She may answer. I don't know that it is important.

Mr. Johnson: What I mean to do, your Honor, is to connect the condition of the trailer in the different locations from other witnesses, in other words, if it was in the same condition when it was moved off the park.

Q. (By Mr. Johnson): Mrs. Nelson, did you ever see the trailer that burned, this Supreme No. 6955, on the lot of Eastern Idaho Trailer Sales, after the fire? A. I did.

Q. And that was some months after the fire?

A. Yes.

Q. And did you look at the trailer at that time?

A. Yes, sir.

Q. And was there any difference in the condition of the trailer at that time than immediately following the fire—after the fire was extinguished?

A. No, sir.

Q. There was no difference? [23]

A. I couldn't see a difference.

Q. And you purchased this trailer, Mrs. Nelson, May 17, 1956, was there—explain to the Court any changes that might have occurred in the trailer from the date of such purchase until June 12, 1956, was there any change in the trailer?

A. Why, yes, it burned up.

Q. June 12, when the insurance was issued?

A. No.

(Testimony of Beatrice Nelson.)

Mr. Johnson: That is all of the questions we have of this witness.

Cross-Examination

By Mr. Martin:

Q. Mrs. Nelson, where were you living in May of 1956? A. On the trailer court.

Q. Pardon? A. In the trailer court.

Q. Prior to the purchase of this trailer?

A. Yes, sir.

Q. Where in the trailer court, were you living in a trailer?

A. Well, I don't know whether you'd call it a trailer or not; it was—it had been a cook shack on a farm. I moved it in there for a residence. [24]

Q. Had you been shopping for trailer houses, prior to May of 1956?

A. Yes, I had looked at some.

Q. And that had been for a period of approximately six months, had it not?

A. Oh, I had been looking at them for longer than that.

Q. For the purpose of buying a trailer house?

A. Hoping I could find one.

Q. You were over near Pocatello on numerous occasions looking at trailer houses, were you not?

A. Well, I think two, to be exact.

Q. Pardon? A. Two, to be exact.

Q. You knew the value of trailer houses, did you not? A. I did.

Q. When you examined that trailer house, you

(Testimony of Beatrice Nelson.)

knew that trailer house had an approximate value of about $6,000 retail, did you not?

A. No, I figured about five, compared to the ones I had looked at.

Q. Pardon?

A. About five in comparision to the ones I had looked at. [25]

Q. Mrs. Nelson, you are being handed your deposition, taken at two o'clock p.m., on May 2nd, 1957, you have that in your hands?

A. I imagine that's it.

Q. I direct your attention to page 10 of your deposition, will you please turn to that page. The next to the last question at the bottom of that page, you were asked: "Did you know that the trailer house had a market value of $6,000?" What was your answer? A. What question?

Q. Next to the bottom of the page, the fifth line up. Do you see where I am reading, are you on page 10, Mrs. Nelson?

A. Yes, sir. What question?

Q. From the bottom of the page, go up to the second "Q," standing for "question."

A. Do you want me to read that question to you?

Q. That is the question, and I quote, "Did you know that trailer house had a market value of $6,000?" What was your answer?

A. That isn't what's written here. The question here is, "Date of the certificate issued in compliance of the Motor Vehicle statute of the State of Texas.

(Testimony of Beatrice Nelson.)

The Court: You may approach the witness and show her the question. [26]

Mr. Martin: If the Court please, we have the wrong deposition. I want the deposition of the Plaintiff, Mr. Clerk.

Q. (By Mr. Martin): You now have your own deposition, is that correct? Now, do you see the second "Q" up from the bottom of the page?

A. Yes.

Q. And I quote, "Do you know that trailer house had a market value of $6,000?" Do you see that question? A. Yes, sir.

Q. And your answer was what?

A. "No, sir."

Q. And the next question, "Did you know that it had a market value of approximately $6,000?" Please turn to page 11, what was your answer?

A. "No."

Q. The next question, "Well, Mrs. Nelson, what is your best estimate as to the market value of that trailer house?" Will you please read your answer?

A. "I imagine that it would have cost that much had I gotten it at a trailer court, but they had a Bill of Sale," I can read what's here but I don't remember saying it.

Q. Go ahead, please. [27]

A. "I imagine that it would have cost that much had I gotten it at a trailer court, but they had a Bill of Sale—no—it wasn't a Bill of Sale,

(Testimony of Beatrice Nelson.)

they had a paper that they were to deliver it for four-thousand at Boise."

Q. Thank you. Now, as a matter of fact you knew that the retail value of that trailer was approximately six-thousand, did you not?

A. I said I figured about five-thousand, in estimate of the ones I had been looking at.

Q. Well, then, what you are saying now is not in accord with what you stated in your deposition, is it?

A. That deposition says that I didn't know that it was valued at six-thousand—those places here.

Q. Mrs. Nelson, had you ever seen these men before? A. No, sir.

Q. Have you ever seen them since the 17th day of May, 1956? A. No, sir.

Q. Would you hand the witness Plaintiff's Exhibit No. 6, please? Mrs. Nelson, you state that that is the paper given to you by the two men?

A. Yes, sir.

Q. I direct your attention to the total price of that trailer house, $4,276.70, is that correct as shown by the exhibit? [28] A. Yes, sir.

Q. And you paid these men $2,000 for that trailer house? A. Yes, sir.

Q. Now, directing your attention to the bottom left hand portion of that exhibit, you see some printing there? A. Yes, sir.

Q. There are three distinct portions there, are there not? Three separate paragraphs?

A. Yes, sir.

(Testimony of Beatrice Nelson.)

Q. Will you please read, for the record, the middle paragraph?

A. "In event of payment by check, other than a cashier's check, or certified check, it is expressly understood that title shall remain with seller until such check is honored."

Q. You did not make your check payable to the Supreme Trailer Company, did you?

A. No, sir.

Q. What authority or authorization did these men say that they had to sell that trailer house?

A. They told the lawyer that they were in authority to act for the company.

Q. They told the lawyer that? [29]

A. Yes, sir, they had the right to sell it.

Q. Did Mr. Loofborrow examine their credentials or papers? A. Yes, sir.

Q. He did? A. Yes, sir.

Q. Do you remember going to Mr. Loofborrow's office with Mr. Smith and Mr. Peterson about, approximately, I will say the 18th of October, 1956?

A. Yes, sir.

Q. Do you recall telling Mr. Peterson and Mr. Smith, just prior to that, to going there, and that same day that Mr. Loofborrow had examined the credentials and papers of these men?

A. Well, I don't recall it. I don't recall them asking me, but——

Q. I will ask you whether or not you recall Mr. Smith, Mr. Stan Smith, asking Mr. Loofborrow

(Testimony of Beatrice Nelson.)

whether he had examined any papers or credentials of either of these men?

A. Well, I can't recall whether he did or not—he was in the office—I don't recall whether he asked him that question.

Q. I will ask you whether or not you recall Mr. Loofborrow told Mr. Smith and Mr. Peterson expressly that he [30] examined no papers or credentials whatever?

A. No, sir, I don't remember him saying that.

Q. Would you state that that could happen?

A. No, because I think we had specified that and I knew it would have been wrong because he did examine them.

Q. What was the reason that you were given for the sale of this trailer house at $2,000?

A. That these men gave me?

Q. Yes.

A. Well, they said they had damaged it and they would sell it at a bargain rather than take it into Boise and it would be rejected and they would have to take it back to Texas and they would sell it at that price rather than trail it clear back to Texas.

Q. Was the trailer house damaged?

A. Yes, sir.

Mr. Martin: Mr. Clerk, may I have these marked as Defendant's Exhibits?

The Clerk: Marked as Defendant's Exhibits Nos. 8, 9, and 10 for identification.

(Testimony of Beatrice Nelson.)

(The documents referred to were marked Defendant's Exhibits Nos. 8, 9, and 10 for identification.) [31]

Q. (By Mr. Martin): Now, Mrs. Nelson, I believe you stated that there had been no change or improvements made to the trailer house between the time you purchased it on May 17, 1956, and the time this policy, or the time that Mr. Peterson consulted you on June 12, or approximately, 1956, is that correct? A. That's right.

Q. So the damage that was caused to this trailer house was the same in June of 1956 as it was in May? A. Yes, sir.

Q. Were there any further improvements made on that trailer house between June of 1956 and the last time you ever saw the trailer house?

A. No, sir.

Q. That fire that occurred, did that cause any exterior damage to the trailer house?

A. No, sir.

Q. You have been handed Defendant's Exhibits 8, 9, and 10, marked for identification. Now, will you please look at Exhibit 8—look at the back——

A. That is No. 8.

Q. Does that picture correctly represent the condition of that trailer house with respect to the exterior damage that existed in May of 1956? [32]

A. Yes, sir.

Q. Will you please look at Exhibit 9, does that

(Testimony of Beatrice Nelson.)

picture correctly represent the exterior damage to that trailer house as it existed in May of 1956?

A. Yes, sir.

Q. Will you look at Exhibit 10, does that picture correctly represent the damage to the exterior of the trailer house as it existed in May of 1956?

A. Yes, sir.

Mr. Martin: We offer the Exhibits in evidence, your Honor.

Mr. Johnson: No objections, your Honor.

The Court: Exhibits 8, 9, and 10 may be admitted.

(The documents referred to were marked Defendant's Exhibits Nos. 8, 9, and 10 and were received in evidence.)

Q. (By Mr. Martin): Mrs. Nelson, did these men deliver to you a Certificate of Title to the trailer house? A. No, sir.

Q. Did you ever make an application by letter, telephone, or any other manner to the Supreme Trailer Company or to the Mobile Homes at Bonham, Texas, for a Certificate of Title, a Bill of Sale, or a Statement of Origin, or anything else to that trailer house? A. No, sir. [33]

Q. The only thing that you relied upon was that the men said that they had the authority to sell it? A. I had my Bill of Sale.

Q. Yes, and that is all you had——

A. At that time.

Q. ——you had their statement that they had

(Testimony of Beatrice Nelson.)

the authority to see it? A. Yes, sir.

Q. Which one of those men told you they had the authority to sell it, Mrs. Nelson?

A. Mr. Roberts.

Q. Now, what did Mr. Roberts look like?

A. I don't think I can answer that. I think I saw them for about forty-five minutes or fifty minutes that day was as long as I saw them. I don't recall what they looked like.

Q. Mrs. Nelson, you stated that you told Mr. Peterson you did not have $6,000 in the trailer house but that it was worth $6,000, is that correct?

A. No, I don't recall specifying the amount.

Q. Did you ever tell him that you paid $2,000 for it when he came over to talk to you about insuring it? A. Yes, sir.

Q. You did tell him you paid——

A. That is the way I recall it, I did. [34]

Q. You are certain of that?

A. I think I am.

Q. Did you discuss with Mr. Roberts or Mr. Pauls a Certificate of Title? A. No, sir.

Q. Now, isn't it a fact that you, in your deposition, you stated they told you that they would send you a Certificate of Title?

A. They told Mr. Loofborrow that they would.

Q. Do you recall a conversation with Mr. Smith and Mr. Peterson, that I believe took place in American Falls on or about October the 18th, 1956, in which you stated to Mr. Smith and Mr. Peterson that these men told you they did not have

(Testimony of Beatrice Nelson.)

a Certificate of Title with them but they would send you one? A. No, I don't recall it.

Q. Would you state that you did not tell them that?

A. No, I wouldn't state that I didn't, but I don't recall it right now.

Q. I think you testified a few minutes ago that they told Mr. Loofborrow they would send a Certificate of Title? A. Yes.

Q. Did they say where from? A. No. [35]

Q. Did they give you any address where you could get in touch with them? A. No, sir.

Q. Was this a brand-new trailer house?

A. Well, they had been sleeping in it.

Q. Well, as between a new and a used trailer house, what was it?

A. I can't say whether it was or not, they said it was a new one.

Q. You saw the invoice, that they were delivering it to the Aetna Trailer Sales in Boise, Idaho?

A. Yes, sir.

Q. Is there any question in your mind that was a new trailer house? A. No, sir.

Q. It was, and you know it, don't you?

A. There is no question. It was just like I say, they had been sleeping in it, there was cigarette burns on the wash stand where they had laid the cigarettes. They said they had been sleeping in it on the trip up.

Q. Mrs. Nelson, was an action brought against

(Testimony of Beatrice Nelson.)

you to repossess that trailer house on behalf of the Supreme Trailer Company or its fidelity company?

A. Was what?

Q. Was an action brought against you to repossess [36] that trailer house on behalf of the Supreme Trailer Company or its fidelity company by reason of the fact that that trailer house had been embezzled or stolen by those men?

A. Well——

Mr. Johnson: We object to the question, your Honor, that the action, if any, would be the best evidence, would be the official court files, if there is any.

The Court: She may answer that "Yes or no," whether an action was brought to recover the trailer. You may answer it, "yes or no."

The Witness: Yes.

Q. (By Mr. Martin): An action was brought to recover that trailer house? A. Yes.

Q. Where is that trailer house?

A. I don't know.

Q. Do you now know that those men had no authority to sell that trailer house, now?

A. No, I don't know it.

Q. Were you successful in that action that was brought against you to recover that trailer house?

Mr. Johnson: Again, we object to the question, the files of the court would be the best evidence.

The Court: She can answer that. She knows whether [37] she was successful or not. You may answer it, "yes or no."

(Testimony of Beatrice Nelson.)

The Witness: I don't think I understand what you mean, will you clarify it just a little?

Q. (By Mr. Martin): Pardon?

A. Would you clarify it, I just don't understand what you mean by that.

Q. Did you defend that action, Mrs. Nelson?

A. I don't know.

Q. You don't know whether you did or not?

A. I don't know, my lawyer handled it—he does all that for me—I don't know what the answer is to that.

Mr. Johnson: I would be glad to refresh her memory.

Mr. Martin: That is all.

Redirect Examination

By Mr. Johnson:

Q. Might we have Plaintiff's Exhibits 6 and 7, please? Mrs. Nelson, looking at Plaintiff's Exhibit 6, in the right hand corner, do the words, "C.O.D." appear on that Exhibit? A. Yes, sir.

Q. And was there any explanation given you by Pauls and Roberts regarding the delivery of this trailer and the terms of the delivery? [38]

A. Yes, sir.

Q. What was that?

A. They were to deliver it C.O.D. to the trailer court in Boise.

Q. In other words, to receive cash on delivery?

A. That's right.

(Testimony of Beatrice Nelson.)

Q. Regarding the check that you gave them for $2,000, you will notice in the lower left hand corner, Mr. Martin asked you about a paragraph, the second paragraph, did Mr. Pauls and Mr. Roberts insist that they receive cash—in other words cash the check in American Falls?

A. Yes, sir.

Q. You mentioned on cross-examination that a Certificate of Title was not issued to you at that time, at any time was a Certificate of Title issued to you? A. Yes, sir.

Mr. Martin: We move to strike that answer for the purpose of an objection.

The Court: It may be stricken, for the purpose of an objection.

Mr. Martin: Did you have a Certificate of Title at any time between May 17, 1956, and the date of the loss, or the date of this fire?

The Witness: No, sir.

Mr. Martin: You did not. We object that [39] the question is incompetent, irrelevant, and immaterial.

The Court: Objection sustained, unless and except the Certificate of Title was received from the owner.

Mr. Martin: Pardon, your Honor.

The Court: I don't know, Mr. Martin, whether they are going to show—I will let them identify the Certificate of Title. I don't know whether it was issued from the owner or from whom. If you are attempting to introduce a Certificate of Title issued

(Testimony of Beatrice Nelson.)
by the State of Idaho based on that Bill of Sale, subsequent to the fire, the ruling to the objection will still stand.

Q. (By Mr. Johnson): Did you apply any time from May 17, 1956, until the date of the fire for a Certificate of Title? A. No, sir.

Mr. Johnson: That is all the questions we have.

Mr. Martin: No recross.

The Court: That is all, Mrs. Nelson.

(The witness left the stand.)

The Court: We will recess for ten minutes.

(The Court was in recess for ten minutes.)

The Court: You may call your next witness.

Mr. Johnson: At this time might we note a correction in the record. When we asked the Court for the request for [40] the admissions of the plaintiff, we said June of 1957, and the examination of the record indicates that they were filed August 14, 1957, and the answers thereto were filed August 20, 1957. If counsel will so stipulate, we ask that the mistake be corrected and that the actual request for admissions to plaintiff be admitted in evidence on the date that they were filed.

Mr. Martin: I think that that is correct, your Honor.

The Court: Very well, the correction may be made.

Mr. Johnson: At this time the plaintiff will call Mr. Thom Fritcher.

JAMES T. FRITCHER

a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please, for the record.

The Witness: James T. Fritcher.

Direct Examination

By Mr. Johnson:

Q. Mr. Fritcher, where do you reside?

A. 238 Washington, Alameda.

Q. How long have you so resided there?

A. Pardon?

Q. How long have you so resided there? [41]

A. At 238 Washington, approximately six months.

Q. And where did you reside before that?

A. At 528 Yellowstone in Alameda.

Q. And how long did you so reside there?

A. Two-and-a-half years.

Q. During the year 1956, what was your business or occupation?

A. I was a service salesman for Eastern Idaho Trailer Sales.

Q. And in such capacity, exactly what did your duties consist of?

(Testimony of James T. Fritcher.)

A. It consisted of servicing—service management—and selling of trailer houses.

Q. Did you have a superior in such position?

A. I did.

Q. And how did you fall in the position exactly, were you in an assistant position or what?

A. I was his assistant.

Q. And how long have you worked around trailer houses?

A. I worked two-and-a-half years for Eastern Idaho Trailer Sales, and before, while in the Navy since 1953, I work part time, on the weekends and leaves that I had around trailers.

Q. And for the two-and-a-half years you worked at [42] Eastern Idaho Trailer Sales were you engaged in the selling of trailers? A. I was.

Q. Did you have occasion to examine trailer number—Supreme Trailer House, serial number 6955, during the year of '56? A. I did.

Q. About when did you examine that trailer?

A. I believe it was in the month of December, around the twentieth, I think.

Q. And did you make a complete inspection of it at that time?

A. I went through the trailer, looking at the fire damage that had occurred in the trailer.

Q. At that time did you form an opinion as to what the full market value of that trailer would be in its condition that it was then in?

A. I did.

Q. And what is that figure?

(Testimony of James T. Fritcher.)

Mr. Martin: Just a minute, to which we object as being irrelevant and immaterial.

The Court: He may answer. That is after the fire, is it not?

Mr. Johnson: Yes, your Honor, December of '56. [43]

Q. (By Mr. Johnson): What would be your opinion? A. Around $900.

Q. Could you distinguish between fire damage—assuming that that trailer had not been damaged fire, and that it was in a condition where the fire damage was not there, and it was in a condition that it would be had there been no fire damage, do you have an opinion as to what the reasonable market value would have been on September 23, 1956—or in this vicinity?

A. Around $6,000.

Q. I see. And assuming that the fire damage had occurred and the trailer was as you saw it in December, and you saw that trailer on September 23, 1956, do you have an opinion as to what the market value would have been then?

A. If that was before the fire damage, it would——

Q. After the fire?

A. After the fire damage, around $900.

Mr. Johnson: That is all.

Mr. Martin: No questions.

The Court: That is all, sir.

(The witness left the stand.)

The Court: I don't know how much evidence you have as to the damages here, Mr. Johnson, is it not possible for [44] counsel to agree that if the Plaintiff is entitled to recover that the damage to the trailer would be a certain amount of money or the difference in value?

Mr. Martin: I think we could, your Honor.

(Off the record discussion by counsel.)

The Reporter: May I have the stipulation, please?

Mr. Johnson: The stipulation being: it is stipulated by and between counsel that the value of Supreme Trailer Home, Number 6955, being the subject trailer home of this litigation, had a value immediately preceeding the fire on September 23, 1956, of $5,895.00 and immediately after the fire which occurred September 23, 1956, the trailer had a value—a full fair market value of $1,267.50, upon such September 23, 1956. Is it so stipulated, counsel?

Mr. Martin: It may be so stipulated.

Mr. Johnson: At this time we would like to call Mr. Dan Bates. Could Mr. Fritcher be excused?

The Court: As far as the Court is concerned, he may.

Mr. Martin: No objection, your Honor.

The Court: Mr. Fritcher may be excused. [45]

DANIEL H. BATES

a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Dan H. Bates.

Direct Examination

By Mr. Johnson:

Q. Would you state your full name, please?

A. Daniel Hiram Bates, signed as Dan H. Bates.

Q. Where do you reside, Mr. Bates?

A. 3409 Poleline Road, Pocatello.

Q. And how long have you so resided there?

A. About seven months.

Q. And where did you reside before that?

A. American Falls, Idaho.

Q. And how long did you reside there?

A. Approximately two years.

Q. Taking your memory back to May 17, 1956, or thereabouts, will you state to the Court if you met a Joseph Roberts and Albert Pauls?

A. Yes, sir.

Q. And would you state to the Court where you met them?

A. I had a place of business half a mile east of American Falls. They were in the cafe there for breakfast [46] one morning in May. They had a trailer-tractor was what they were driving. After breakfast—I had just purchased a trailer house

(Testimony of Daniel H. Bates.)

for myself—they asked me if I wanted to buy another one.

Mr. Martin: Your Honor, we object to this testimony that it is hearsay as far as the defendant is concerned, not binding on the defendant, and irrelevant and immaterial.

The Court: The objection will be sustained as to any conversation that he had with these men.

Q. (By Mr. Johnson): Did you introduce these people to Beatrice Nelson? A. Yes.

Q. Where did that introduction take place?

A. At the Paradise Lounge.

Q. Were you present during any discussion between the plaintiff and these two persons?

A. Yes, sir.

Q. Were you present at any time when there was a discussion with Lawyer Loofborrow?

A. Yes, sir.

Mr. Johnson: We have no further questions, your Honor.

Mr. Martin: Mr. Bailiff, will you please take the deposition of the plaintiff, Beatrice Nelson, and hand it [47] to this witness.

Cross-Examination

By Mr. Martin:

Q. Mr. Bates, you stated that you had just bought a trailer house yourself? A. Yes, sir.

Q. You were not interested in any other trailer house then, were you?

A. Yes, sir, I was. I wanted to get a bigger one.

(Testimony of Daniel H. Bates.)

Mr. Martin: No further questions.

Mr. Johnson: Excuse me, what was that last answer?

The Witness: I wanted to get a bigger trailer.

Mr. Johnson: What was the last question?

Mr. Martin: I asked him if he were interested in any other trailer house himself. No further questions.

Mr. Johnson: We have no further questions.

The Court: That is all, sir.

(The witness left the stand.)

The Court: Call your next witness.

Mr. Johnson: Your Honor, the Plaintiff rests.

The Court: Very well.

Mr. Martin: At this time the defendant offers in evidence the deposition of Robert D. Franks and Leonard Riley which has already been published.

The Court: Are you going to read that into the [48] record, Mr. Martin?

Mr. Martin: No, your Honor, in order to save time, I can either read it into the record, or I would prefer that it be considered read and let the Court examine it at the Court's convenience.

The Court: It would have to be stipulated, Mr. Martin, otherwise there might be some objections to questions. If counsel wants to stipulate that it be introduced and considered read into the record, it may be done.

Mr. Johnson: We have never seen a copy, your

Honor, for that reason we cannot so stipulate, at the present time. If it could be read we could object to the questions as they are asked and answered.

Mr. Martin: I don't think we are going to finish this morning so I can let counsel examine this during the noon recess in order to save time.

The Court: Very well.

Mr. Martin: Mr. Stan Smith, please.

STANLEY SMITH

a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Stanley Smith. [49]

Direct Examination

By Mr. Martin:

Q. Please state your full name for the Court and the Reporter? A. Stanley S. Smith.

Q. Your place of residence?

A. Hawthorne Road, Pocatello, Idaho.

Q. How long have you resided here, Mr. Smith?

A. Approximately three years.

Q. Your business?

A. Insurance claims adjuster.

Q. By whom are you employed or for whom do you work?

A. General Adjustment Bureau.

Q. Is that a corporation?

(Testimony of Stanley Smith.)

A. That is correct.

Q. What is your capacity with your employer?

A. I'm the Pocatello branch manager.

Q. Mr. Smith, do you recall whether or not you and Dean Peterson went to American Falls on or about October 18, 1956, and had a conversation with the plaintiff, Beatrice Nelson?

A. Yes, I recall it.

Q. Where did this conversation take place?

A. Well, we had several conversations. The first [50] one was in her new acquired Angelus Trailer Home.

Q. Now, directing your attention, particularly to a Certificate of Title, do you recall whether or not there was any conversation with respect to the Certificate of Title between you and Mr. Peterson and the plaintiff, Beatrice Nelson?

A. Yes, I recall it.

Q. Will you please relate to the Court in substance and effect that conversation?

A. Well, Mr. Peterson sort of carried the ball of that part of the conversation; as I recall he said, "Now, Bea, what kind of papers do you have to show your ownership of the trailer?" She remarked that she had a Bill of Sale that was given to her, and I don't just recall what was said by either Peterson or myself, but I do recall that she told us that she had been promised a Certificate of Title that was to be sent to her, I presume by mail. Apparently she had never received it.

Q. By whom?

(Testimony of Stanley Smith.)

A. By the two men that had given her the Bill of Sale—or the one man.

Q. Do you recall whether or not she stated that they had told her that?

A. Yes, that is right, they told her they would send her a Bill of Sale—excuse me, a Certificate of Title. [51]

Q. Do you know whether or not she had a Certificate of Title to that trailer house at that time?

A. I know that she said that she did not have any.

Q. Now, was there any conversation relative to the time she went to Mr. Loofborrow's office in May of 1956, relative to the drawing up of this Bill of Sale?

A. I'm sorry, I didn't get the question.

Mr. Martin: Mr. Reporter, will you read the question, please?

> (The Reporter read the question as follows: "Question: Now, was there any conversation relative to the time she went to Mr. Loofborrow's office in May of 1956, relative to the drawing up of this Bill of Sale?"

A. Oh, yes, yes. She told us that she had gone.

Q. (By Mr. Martin): Will you please tell the Court what the substance of that conversation was with respect to Mr. Loofborrow having examined any instruments?

A. Well, she said that Mr. Loofborrow was her lawyer and that they had gone down there to his

(Testimony of Stanley Smith.)

office and that Mr. Loofborrow had either checked or examined the credentials or papers which these men showed Mr. Loofborrow, so that he could pass on whether or not they had the right to sell the trailer. That would be the substance of it.

Q. Did you and the plaintiff, Beatrice Nelson, and [52] Mr. Peterson, that same day then go to Mr. Loofborrow's office? A. Yes.

Q. Did you have a conversation with Mr. Loofborrow in the presence of the plaintiff, Beatrice Nelson, and Mr. Dean Peterson? A. Yes.

Q. Directing your attention to—or relative to the examination of any papers, did you ask Mr. Loofborrow whether he had made such an examination? A. I certainly did.

Q. Please tell the Court the substance and effect of that conversation.

A. Well, I did ask Mr. Loofborrow if he had checked any papers—frankly I didn't know what the papers were—they were just referred as papers—that these two men showed him so that he would know that it could be a proper sale. And Mr. Loofborrow very emphatically told me that he had not checked any papers, that he had only been asked to draw up a Bill of Sale, and that was all that they asked of him and that is all that he did. He then commented that a Bill of Sale was not any better than the person who would give a Bill of Sale. He turned around and he asked Mrs. Nelson, "Did you know those two men?" She said, "No," she didn't. I don't recall any par-

(Testimony of Stanley Smith.)

ticular [53] conversation thereafter. There was kind of a silence, it seemed like, and we left.

Q. Now, Mr. Smith, as the Manager of the General Adjustment Bureau, here in Pocatello, tell the Court whether or not you have received in your normal course of business, in representing insurance companies, notification that this trailer house had been stolen and for you to try to find it?

A. Well, I received a memorandum from our Boise Office advising me to——

Mr. Johnson: We object to what the memorandum advised. If he has it in his possession it would be the best evidence.

Q. (By Mr. Martin): Do you have the memorandum in your possession? A. Yes, I do.

Q. May we have it, please?

(The witness left the stand to get the document in question and returned to the witness stand.)

Mr. Martin: Mr. Bailiff, will you please have the Clerk mark those two instruments?

The Clerk: Marked as Defendant's Exhibits Nos. 11 and 12 for identification.

(The documents referred to were marked Defendant's Exhibits Nos. 11 and 12 for identification.) [54]

Mr. Martin: Will you hand those to the witness?

(The documents were handed to the witness.)

(Testimony of Stanley Smith.)

Q. (By Mr. Martin): Handing you what has been marked Defendant's Exhibit No. 11 for identification, can you identify that instrument?

A. Yes.

Q. What is that?

A. It's an inter-office memorandum from our Boise Branch Office to the Pocatello Branch Office.

Q. Is that the memorandum which you just started to testify about? A. That is correct.

Mr. Martin: We offer that in evidence, your Honor.

Mr. Johnson: May we examine it, please?

The Court: Any objection?

Mr. Johnson: There was an enclosure with the letter that it states here.

Mr. Martin: It was part of the correspondence.

Mr. Johnson: We have no objection, your Honor.

The Court: There is nothing in the record to show what was attached to this exhibit.

Mr. Martin: A photostatic copy of a telegram sent by Joseph Roberts to the Supreme Trailer Company in Bonham, Texas. [55]

The Court: Very well, if there is no objection Exhibit No. 11 may be admitted.

(The document referred to was marked Defendant's Exhibit No. 11 and was received in evidence.)

Q. (By Mr. Martin): Now, Mr. Smith, is that

(Testimony of Stanley Smith.)

the memorandum which you referred to—which you received with reference to the trailer house which is the subject matter of this law suit, having been stolen?

A. Well, when I received it I didn't know that it referred to the trailer. I just knew that it referred to a trailer.

Q. Did you, upon examination of the memorandum, and then upon receiving this claim of fire damage tie up with the memorandum and this trailer house?

A. Well, I had had a fire damage file for quite some time in my desk.

Q. But, did you tie up the two of them?

A. That is correct.

Q. Pardon? A. Yes.

Q. Can you tell the Court whether or not you determined that the trailer house which is the subject matter of this law suit is the same trailer house that is reported stolen to you, as set forth in Defendant's Exhibit [56] No. 11?

A. Well, the descriptions were identical, including serial numbers.

Q. Did you determine that it was that trailer house? A. Yes.

Q. Now, will you please take Defendant's Exhibit 12, what is that exhibit, can you identify it?

A. It's a warrant of arrest, State of Texas vs. Joseph Roberts.

Q. And did you receive that in your usual and normal course of business with reference to the memorandum on the stolen trailer house?

(Testimony of Stanley Smith.)

A. Well, it came from our Boise Branch Office. I don't recall now what it came with.

Mr. Martin: We offer Defendant's Exhibit 12 in evidence.

Mr. Johnson: To which offer of the exhibit we object on the ground it is immaterial to this law suit; that it is not the best evidence; that the witness is not competent to verify anything to do with the exhibit; and it is irrelevant and it is pure hearsay; there is no foundation laid whatsoever for the admission of this exhibit.

The Court: What is the purpose of this, Mr. Martin?

Mr. Martin: The purpose of that, your Honor, is to [57] show the embezzlement of this trailer house by the——

The Court: You cannot show embezzlement by a warrant of arrest, or——

Mr. Martin: I am sorry—the unlawful act, or alleged unlawful act, by the true owner of this trailer house of Mr. Paul and Mr. Roberts.

The Court: The mere issuing of a warrant of arrest does not necessarily mean that a man has committed a crime.

Mr. Martin: That is true, your Honor, we are not trying to——

The Court: If it is something that has to do with notice to this man, that might have a bearing on what he did later, that might be alright, but as proving that the trailer house was stolen or that

(Testimony of Stanley Smith.)

this man was guilty of embezzlement it is immaterial.

Q. (By Mr. Martin): Mr. Smith, did you make inquiry by reason of Defendant's Exhibits 11 and 12, to try to ascertain the whereabouts of Joseph Roberts?

Mr. Johnson: To which question we object on the grounds that any inquiry is a trespass on the plaintiff.

The Court: He may answer that question, "yes or no."

The Witness: No. [58]

Q. (By Mr. Martin): Do you know where Joseph Roberts is? A. No.

Q. Do you know whether or not he has ever been heard of by anybody since the sale of this trailer house to the plaintiff?

A. I wouldn't know.

The Court: If there is no other purpose for which this Exhibit is being offered, Mr. Martin, I will have to sustain the objection.

Mr. Martin: Very well, your Honor. That is all.

Cross-Examination

By Mr. Johnson:

Q. Mr. Smith, you stated that your first conversation with Bea Nelson—Beatrice Nelson—was in her Angelus Trailer Home, is that correct?

A. Well, my first conversation on that particular day.

(Testimony of Stanley Smith.)

Q. I see. Had you ever met her prior to that time? A. Yes.

Q. When was that?

A. It was on the date of the fire, September 23, 1956.

Q. And did you go to the site of the fire itself?

A. Yes. [59]

Q. Were you with any other person?

A. Yes.

Q. Who was that person?

A. Mr. Dean Peterson.

Q. Can you remember any of the conversation that took place at that time with the plaintiff and yourself?

A. I recall that we had a conversation.

Q. Do you recall anything that was said?

A. Well, in essence, I no doubt would recall it.

Q. Would you state to the Court what the essence of that was?

A. Well, I recall that she mentioned that she was not in the trailer at the time of the fire but she was out on the farm. I believe I asked her if she had any knowledge as to the origin of the fire and I don't believe that she knew the exact cause. The conversation, as I remember, pertained strictly to the circumstances of the origin and the particular damage as we observed it throughout the trailer. I don't——

Q. Was there any—did you subsequently examine or investigate into the origin of the fire?

A. In a limited manner.

(Testimony of Stanley Smith.)

Q. Was there anything about the origin that might have been untoward, in the sense that there was a moral risk involved. [60]

Mr. Martin: Just a minute, counsel. We object to that question as being incompetent, irrelevant and immaterial, and has no bearing on the issues, and is certainly not within the issues.

The Court: Objection sustained. It is not being contended that she set the trailer house on fire.

Q. (By Mr. Johnson): About what date was this that you—was that the date of the fire, September 23, is that correct?

A. Well, I recall Dean called me up on a Sunday, and we went over in my car on a Sunday. I would say it was about September 23, it could have been September 23.

Q. Examining Exhibit 11, would you state to the Court about when that was received in your office?

A. Well, we have date stamped it in our office as October 18, which is probably about the date we received it.

Q. After you received that, how long was it before you had—I forget the words Mr. Martin used—connected up the trailer there as being the trailer in American Falls?

A. About two minutes.

Q. And after that two minute interval, who did you notify, if any one?

A. Dean Peterson.

Q. Who else?

A. Well, in what interval of time? [61]

(Testimony of Stanley Smith.)

Q. In the next several weeks?

A. I notified our Boise Branch Office that it seemed that we had located a trailer that they had described.

Q. Yes. What was your—you state the morning that the fire occurred, Dean Peterson contacted you, is that right?

A. Well, it was sometime during the day, I don't recall whether it was morning or after lunch, but it was that day.

Q. And that was for the purpose of the general adjustment of possible claims?

A. Well, it was for the purpose of inspecting the fire loss.

Q. For whom? By whom were you employed?

A. Dean Peterson asked me to go with him and inspect the fire loss for one of his insureds. I didn't frankly know at that time anything about the coverage information, if that is what you are referring to.

Q. And did you subsequently know for which insured that——

A. Oh, yes, we get policy information.

Q. And did the plaintiff, Beatrice Nelson, submit to you a proof of loss.

A. Well, I believe there was one submitted.

The Clerk: Marked as Plaintiff's Exhibit No. 13 [62] for identification.

(The document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

(Testimony of Stanley Smith.)

Q. (By Mr. Johnson): I hand you Plaintiff's Exhibit No. 13 for identification, and ask you if that is your signature that appears thereon?

A. I didn't sign it, if that is what you mean.

Q. Did that letter come from your office?

A. Oh, yes.

Q. Looking at the contents, was there a supplemental sworn statement, Proof of Loss, submitted to you by the plaintiff, Beatrice Nelson?

Mr. Martin: If it please the Court, I am going to object to that. We have stipulated, and there is in evidence the original Proof of Loss and the Supplemental Proof of Loss.

The Court: He may answer that question, whether it was submitted to him.

The Witness: Well, for what it's worth, my secretary signed my name on this particular letter, I probably dictated it, it looks like something that I did.

Q. (By Mr. Johnson): Do you remember, from your recollection, whether there was an amended Proof of Loss submitted to you? [63]

A. I would say, yes.

Q. Do you remember what you did with that Proof of Loss, if anything?

A. Probably submitted it to the insurance company that was involved.

Q. Would that amended Proof of Loss be received by you prior to the date of that letter?

(Testimony of Stanley Smith.)

A. Well, on or before, I presume.

Q. Would you have dictated such a letter if you had not received such a Proof of Loss?

A. Not knowingly.

Q. You would do it, maybe unknowingly?

A. That would be the only way, the only way I would do it.

Q. I want to establish in my mind from you, do you do things unknowingly? Would that have been done in your office?

A. If I did them unknowingly, I couldn't tell you, could I?

Q. No, that is true. Do you remember seeing that letter or copies of that letter?

A. I may not have seen it, in view that I didn't sign it, I might have dictated the letter but I very likely didn't see it.

Q. Do give your secretary permission to sign your [64] name?

A. In a limited degree, that is correct.

Q. Could she sign a letter such as this?

A. I beg your pardon.

Q. Could she sign a letter such as this?

A. Oh, she could, sure.

Q. Do you know her signature when you see it?

A. It sounds silly but I have two girls and I don't know one from the other, I have never paid that much attention to it.

Mr. Johnson: We have no further questions.

The Court: Do you have any further questions.

Mr. Martin?

Mr. Martin: No, your Honor.

The Court: That is all, sir.

(The witness left the stand.)

The Court: We will recess until 1:30 this afternoon. Counsel has not had an opportunity to examine that deposition so we will recess until 1:30.

(The Court recessed at 12:00 o'clock noon.) [65]

November 23, 1957—1:30 P.M.

The Court: Call your next witness.

Mr. Martin: Mr. Peterson, please.

H. DEAN PETERSON

a witness previously produced, sworn, and having testified in this matter, was recalled to the stand for further examination on behalf of the Defendant, and testified as follows:

Direct Examination

By Mr. Martin:

Q. Mr. Peterson, you went over to American Falls with—first, let me ask you this—some time in June, and the date has not been established, do you know when you went over to American Falls and contacted the Plaintiff with reference to this trailer house?

A. In what regard to the trailer house?

(Testimony of H. Dean Peterson.)

Q. The first time you contacted her, do you recall about when that was?

A. I contacted her some time, I believe, in June.

Q. Of 1956? A. Of 1956.

Q. Now, were you present in court all of this morning? [66] A. Yes.

Q. Now, did you hear the plaintiff testify that she told you, when you first contacted her with reference to insuring this trailer house, that she paid $2,000 for it? A. Yes.

Q. Tell the Court whether or not she did tell you that.

A. The price of the trailer house was never mentioned.

Q. She never mentioned to you that she paid $2,000 for it?

A. Not at the time of the purchase of the insurance.

Q. When did you first know that fact?

A. On one of my trips to American Falls with Stan Smith.

Q. That was after the fire damage?

A. Yes.

Q. Now, did you hear Mr. Smith testify relative to the conversations between he and you and the plaintiff, on or about October 18, 1956, at her trailer house? A. Yes.

Q. If I asked you the same questions would your testimony be substantially the same as Mr. Smith's

(Testimony of H. Dean Peterson.)

was?

Mr. Johnson: We object to that question. He can state what conversation he had and what he [67] said.

The Court: The objection will be sustained. He should state what he heard.

Q. (By Mr. Martin): Did you hear Mrs. Nelson testify this morning that the men did not tell her that they would send her a Certificate of Title but told that to Judge Loofborrow? A. Yes.

Q. Can you state whether or not at the conversation at her trailer house, on or about October 18, 1956, she told you and Mr. Smith that the men told her they would send her a Certificate of Title?

A. Yes.

Q. Did she so state to you and Mr. Smith?

A. I believe so.

Q. Now, did you, later that day, accompany Mr. Smith and the plaintiff, Mrs. Nelson, to Judge Loofborrow's office? A. Yes.

Q. Do you recall whether or not Mr. Smith asked Judge Loofborrow whether or not he had examined any papers back in May, at the time that he prepared the Bill of Sale? A. Yes.

Q. And what was his reply to Mr. Smith as to whether or not he had examined any papers?

A. His reply was that he hadn't. [68]

Mr. Martin: That is all.

(Testimony of H. Dean Peterson.)

Cross-Examination

By Mr. Johnson:

Q. At the time of the later conversation between Judge Loofborrow, and Beatrice Nelson was present, is that correct? A. Yes.

Q. At that time did Judge Loofborrow say that he had prepared a Bill of Sale? A. Yes.

Q. On the conversation which you originally had with Beatrice Nelson, on or about May 17, 1956, excuse me, on or about June 12, 1956, that is before the policy of insurance was issued, could you state to the Court exactly what transpired in that conversation, what you said to her and what she said to you?

A. I don't know just exactly what time you are talking about.

Q. Before the policy of insurance was issued to Beatrice Nelson, June 12, 1956, you had discussed the purchase of insurance with her, is that correct?

A. Yes.

Q. At that time, during that conversation or discussion, what was said?

A. In general, the conversation was that I [69] complimented her on having a nice trailer house —and it was a nice trailer house—and through conversation it developed—and I don't recall just how, that the trailer should have a fair retail value of around $6,000 and Mrs. Nelson told me that she didn't pay that much for it. And in the ensuing

(Testimony of H. Dean Peterson.)

conversation we attempted to arrive at what would be a normal amount of insurance to place on it, and through conversation we decided that $5,000 was a good insurable value of the trailer.

Q. And she at no time stated to you that she paid $5,000 for that trailer?

A. No; she did not.

Mr. Johnson: Could we have Plaintiff's Exhibit 3, I believe it is?

Q. (By Mr. Johnson): Showing you the first page of Plaintiff's Exhibit 3, in the column, "Actual Cost When Purchased, Including Equipment," that figure did not come from the plaintiff, Beatrice Nelson, is that correct?

A. No; that figure did not come from her.

Q. And the day that you discussed this with her, did you state at that time that you would write up an insurance policy and send her a bill?

A. Yes.

Q. And did you do that? [70] A. Yes.

Q. At any time during your trips to American Falls following the fire loss and investigating this particular fire loss, did you go there with Stan Smith, to American Falls?

A. I—would you repeat the question?

Q. In the investigation of this fire damage, did Stan Smith investigate with you? A. Yes.

Q. Did you look into this matter also, yourself?

A. Yes, from a standpoint.

Q. At any time were any bids secured on this trailer house?

(Testimony of H. Dean Peterson.)

A. I am not familiar with that, I presume and I believe that there was, but the mechanics of handling the adjustment, I'm not familiar with.

Q. Are you familiar with whether or not a check was received in payment of this trailer house in 1956 from an anticipated sale?

A. I believe there was.

Mr. Martin: Just a moment. I object to that question as ambiguous, a check received, who from, what for, and when.

Q. (By Mr. Johnson): Are you familiar if there was a check received [71] from Steve Rhodes, payable either to the New Hampshire Fire Insurance Company or Beatrice Nelson in payment of the salvage of this trailer?

A. I believe that there was.

Mr. Martin: Just a moment. I am going to object to that as indefinite as to time, your Honor.

The Court: He may answer it, "yes or no."

Q. (By Mr. Johnson): Regarding this check, did you make a personal trip to American Falls yourself because of this check?

A. That wasn't the only purpose of the trip.

Q. But that was one of the purposes?

A. Yes.

Q. Would you state to the Court what one of the purposes of the trip was?

Mr. Martin: Now, I am going to object to this; it is improper cross-examination, not having been brought out on direct.

The Court: Objection sustained.

(Testimony of H. Dean Peterson.)

Q. (By Mr. Johnson): On that trip did you have a conversation with Judge Loofborrow?

Mr. Martin: Same objection, your Honor.

The Court: Objection sustained.

Mr. Johnson: We have no further questions—oh, excuse— [72] might I cross-examine a bit further, your Honor?

The Court: Yes.

Mr. Johnson: At this time we would like to have a paper marked as Plaintiff's Exhibit——

The Clerk: Marked as Plaintiff's Exhibit No. 14 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 14 for identification.)

Mr. Johnson: Also, we would like to have this marked Plaintiff's Exhibit 15 for identification, being two papers stapled together.

(The document referred to was marked Plaintiff's Exhibit No. 15 for identification.)

Q. (By Mr. Johnson): Showing you Plaintiff's Exhibit 14 for identification, does your name appear on that exhibit? A. Yes.

Q. Is that purported to be an endorsement on an insurance policy? A. Yes.

Q. And what policy is that an endorsement on?

Mr. Martin: Just a minute. Your Honor, that exhibit is not in evidence; we object to the question.

(Testimony of H. Dean Peterson.)

The Court: Objection sustained. Ask him what it is. [73]

Q. (By Mr. Johnson): What—that is in two parts, that exhibit, one purporting to be an endorsement, what is the other part?

A. It's also an endorsement.

Q. Could you state to the Court, generally, what they purport to be an endorsement of?

Mr. Martin: We object to that that the exhibit is not in evidence, your Honor.

The Court: He may answer that question.

The Witness: One endorsement is changing the item insured from a '56 Supreme Trailer Home to a 1956 Angelus Trailer Home and increasing the amount of insurance from five thousand to seven thousand, and the other endorsement adds $2,000 coverage on the personal effects in the newly acquired trailer.

Q. And what date do they purport to be written?

A. The effective date of the endorsement is December 1, 1956.

Q. From the exhibit can you see any relation to them with Exhibit 3 of the Plaintiff?

Mr. Martin: Now, we object to that in that the testimony now shows that the alleged endorsement is after the date of the loss and therefore is irrelevant and immaterial as to this subject matter.

The Court: He has not offered it yet, Mr. [74] Martin.

Mr. Martin: We object to his testimony, your Honor.

(Testimony of H. Dean Peterson.)

The Court: He may answer that, what it is a purported endorsement on.

Q. (By Mr. Johnson): Does this purport in any way to be related to Exhibit 3, being the policy in evidence?

A. Yes; it amends that policy.

Mr. Johnson: At this time, your Honor, we offer in evidence Plaintiff's Exhibit 14 for identification as Plaintiff's Exhibit 14.

Mr. Martin: To which we object on the grounds that it is incompetent, irrelevant, being subsequent to the time of the fire loss.

Mr. Johnson: We submit it is material to show the continued existence of the insurance policy which is here sued upon, the contract of insurance between the insured and the insurer, that there is no evidence that there has been a return of premium except that which is in the deposition of the plaintiff, and the Court will see was made many months after this, and, therefore, it shows that there could be in contemplation of loss, very well, a waiver of any defect regarding the insurable interest and the company knowingly, with all the knowledge at their disposal issued an endorsement on the same policy of insurance [75] for a new trailer house.

Mr. Martin: If the Court please, there is no such information in this record that this company knowingly and with all of this information available did that.

The Court: As I understand it, this endorsement,

(Testimony of H. Dean Peterson.)

is this a change of trailer from the one that the original policy was issued on?

Mr. Johnson: Yes, sir; it is on a new trailer house. It does show—it's just, whatever it might be worth—to show that, of course, behind this law suit, in the affirmative defenses, it seems to us, at least, that there is a moral risk issue, and this also shows that the policy—the company, at least with the knowledge they had at that time issued an endorsement on the exact same policy to the plaintiff in this suit. And whatever knowledge they had at that time they did this.

The Court: That would not make any difference in your right to recover if they did.

Mr. Johnson: Well——

The Court: I will admit it for what it is worth. I do not think it has any value but I will admit it.

(The document referred to was marked Plaintiff's Exhibit No. 14 and was received in evidence.)

Mr. Johnson: Preliminary to making an offer I would like to ask just one question. [76]

Q. (By Mr. Johnson): Mr. Peterson, between the time of this fire loss and December 1, or around the first of December, did you have occasion to discuss the alleged, or might have been, embezzlement of this trailer house with Mr. Stan Smith?

A. I think so, undoubtedly.

Q. And when did you first hear, if you remember, of such a possibility?

(Testimony of H. Dean Peterson.)

Mr. Martin: Objection, your Honor, improper cross-examination.

The Court: Objection sustained.

Mr. Johnson: We have no further questions, your Honor. We withdraw Exhibit No. 15.

Mr. Martin: No further questions.

(The witness left the stand.)

Mr. Martin: At this time, your Honor, may we offer into evidence the deposition, taken in Bonham, Texas, of Robert D. Franks and Leonard Riley, the same having been published this morning?

Mr. Johnson: To which we object your Honor. We have studied this deposition during the lunch hour. The deposition appears to us, the questions and answers, except for the preliminary questions on the first page of each witness to be incompetent, and irrelevant, and immaterial [77] to this particular action, that is an action between an insured and insurer on a policy of insurance for loss. We can find no relevancy whatsoever.

The Court: Very well, if you are not going to stipulate that it may be introduced, the same as if read in evidence, then you will have to read it and I will have to rule on each and every question to which an objection is made. I take it that the deposition was taken for use at this trial?

Mr. Martin: That is correct, your Honor.

The Court: We will have somebody take the witness stand.

Mr. Martin: May I suggest your Law Clerk, your Honor?

The Court: That will be satisfactory.

Mr. Martin: I will read the questions, your Honor, and Mr. Hess can read the answers.

The Court: Very well.

Mr. Martin: For the record, the cover sheet is cause No. 2012, the court and the title of the case being the same. This is the deposition of Robert D. Franks and Leonard Riley, taken by Jessie Varner, a shorthand reporter. For the record your true name is what?

Mr. Hess: Gerald W. Hess.

Mr. Martin: I will read the questions and you will [78] read the answers in this deposition, commencing on page 3, please.

ROBERT D. FRANKS

the deposition of Robert D. Franks was read as follows; the questions in the deposition having been asked by Mr. Edward Southerland.

Examination

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Would you state your name?

A. Robert D. Franks.

Q. Mr. Franks, yesterday when you were in our office, you advised us your wife had been taken to the hospital to undergo surgery; is she getting along all right? A. Yes, sir; she is.

(Deposition of Robert D. Franks.)

Q. We are glad to hear it. Where do you live?

A. 320 East Boyd, here in Bonham, Texas.

Q. What official position, if any, do you hold with Supreme Trailer Company?

A. Vice-president and General Manager of Supreme Trailer Company and also an affiliate sales company, Southwest Mobile Homes Sales Company.

Q. Approximately how long have you held that position? A. Practically four years.

Q. Is Supreme Trailer Company a manufacturing plant? [79] A. Correct.

Q. What does Supreme Trailer Company manufacture?

A. Mobile homes and occasionally known as house trailers.

Q. Approximately how many people are employed at the Bonham plant?

A. Slightly over two hundred. I believe two hundred and four, last week.

Q. How long has the company been manufacturing house trailers, how long at Bonham, Texas, approximately?

A. Four and a half years at Bonham. Twelve years total in other locations.

Q. Is Supreme Trailer Company now manufacturing house trailers at any other location other than Bonham, Texas, during the past year or year and a half? A. No.

Q. Mr. Franks, as general manager of the local company—I believe you stated your position?

A. Yes, sir.

(Deposition of Robert D. Franks.)

Q. Mr. Franks, do you know, of your own knowledge, whether your company, during the past few years, sold house trailers to Aetna Trailer Sales?

A. Yes; been selling the entire chain of fourteen locations at least four or five years.

Q. Where is the home office of Aetna Trailer Sales? [80]

Mr. Johnson: To which question we will object on the ground that it is irrelevant and immaterial.

The Court: Will you read the question again?

Mr. Martin (Reading): "Where is the home office of Aetna Trailer Sales?"

The Court: He may answer.

"A. Salt Lake City. Formerly it was in Denver, until the death of the corporate president."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Does Aetna Trailer Sales have a branch office in Boise, Idaho?

A. It has a sales lot in Boise.

Q. Mr. Franks, have you made a search of your company's records to determine if on or about May 4, 1956, your company delivered to Aetna Trailer Sales at Boise, Idaho, a house trailer, serial number 6995, model 146-F? A. Yes; we did.

Q. Do you have the original invoice reflecting that transaction?

A. No; it was mailed to the main office of Aetna Trailer Sales, 1209 Broadway Street, Denver.

(Deposition of Robert D. Franks.)

Q. Do you have a duplicate record?

A. Yes; I do. We have from our accounting records invoice 2905.

Q. Will you let me see it? [81] A. Yes."

Mr. Martin: If the Court please, I think it is probably attached to the deposition. I will have to take it and have it marked, and received in evidence.

The Court: It has been admitted as Plaintiff's Exhibit No. 6, in evidence.

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Mr. Franks, I am referring to what is identified as Defendant's Exhibit 1"——

Mr. Martin: Now I, in this matter is Plaintiff's Exhibit No. 6.

"Q. (Reading): ——which is invoice No. 2905, dated May 4, 1956, reflecting the sale of a trailer, model 146-F, serial Number 6995, and ask you to state if that invoice was prepared in your office?

A. Yes; it was.

Q. Was it prepared under your direct supervision? A. Yes.

Q. Are all invoices reflecting transportation of trailers prepared in your office and under your direct supervision? A. Yes, sir.

Q. Mr. Franks, if you know, please state how trailer No. 6995 was to have been delivered to Aetna Trailer Sales at Boise, Idaho? [82]

(Deposition of Robert D. Franks.)

A. This model home was the result of an order for such model, which was produced to meet their specification, in that, a few special items will be noted, such as washing machine, larger than usual heater and carpet. After the trailer is built in our factory, it was to be shipped by our truck to Aetna Trailer Sales office at Boise, and a separate freight bill from our transport division is available.

Q. I note that"——

Mr. Martin: The deposition states "D-1," which in the instant matter is Plaintiff's Exhibit No. 6.

"Q. (Reading): ——bears the heading 'Southwest Mobile Homes Sales Corporation.' I note the Bill of Lading or invoice marked 'D-1' (Plaintiff's Exhibit No. 6) bears the heading 'Southwest Mobile Homes Sales Corporation.' What is Southwest Mobile Homes Corporation?

A. That is an affiliate sales company, which handles sales of all Supreme-Victor mobile homes in the Western portion of the United States. This is owned and operated by the same officers and stockholders as Supreme Trailer Company.

Q. Who are the stockholders of the Supreme Trailer Company?"

Mr. Johnson: To which we object on the grounds the witness is not competent to give that [83] information.

Mr. Martin: If the Court please, the witness has testified that——

The Court: He may so testify, if he knows. I do not know what the purpose of it is.

(Deposition of Robert D. Franks.)

A. (Reading): "Three brothers, known as Robert De Rose, Anthony De Rose, and Don De Rose."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. I will ask you are these three also the sole stockholders of Southwest Mobile Homes Sales Corporation?"

Mr. Johnson: We object to the question on the ground that it is irrelevant and also this witness is not competent to state that information.

The Court: He may answer.

"A. Yes."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. State if Supreme Trailer Company and Southwest Mobile Homes Sales Corporation have the same individuals as directors?"

Mr. Johnson: We object to the question that it is irrelevant and not the best evidence from this witness, your Honor.

The Court: He may answer.

"A. Yes, they have."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Are these two companies separate corporations? [84] A. Yes.

(Deposition of Robert D. Franks.)

Q. I will ask you to state where the home office is of Southwest Mobile Homes Sales Corporation?

A. In Bonham, Texas.

Q. What is your position, if any, with Southwest Mobile Homes Sales Corporation?

A. Vice-president and general manager of that, as well.

Q. I will ask you to state if Southwest Mobile Homes Sales Corporation has executive and clerical personnel different from those of Supreme Trailer Company?

A. Basically, they are the same.

Q. Which corporation manufactures the house trailers? A. Supreme Trailer Company.

Q. Which corporation sells the house trailers?

A. Southwest Mobile Homes Sales Corporation sells to the dealers in the Western area of the United States.

Q. Now, Mr. Franks, I will ask you to state if it is the practice of Supreme Trailer Company or Southwest Mobile Homes Sales Corporation—and I use the term interchangeably—to sell house trailers on credit?

A. No, as a general rule, we do not sell on credit.

Q. How are your sales effected, with reference to cash or credit?

A. Well, they are generally sold on a C.O.D. basis, [85] sight draft or floor plan basis.

Q. What do you mean by C.O.D.?

A. Normally speaking, we collect on delivery.

(Deposition of Robert D. Franks.)

Q. When a house trailer is sold C.O.D., is the driver required to collect for the trailer at the time of delivery? A. Normally, yes.

Q. When a trailer is sold to a dealer that maintains an account with your company, is payment subsequently made by check? A. Yes.

Q. Is that after delivery?

A. Yes, would be after delivery.

Q. I will ask you if any of your drivers are ever permitted to collect the sale price of trailers in cash?"

Mr. Johnson: To which question we object on the ground it is incompetent and irrelevant and immaterial; that this witness, setting up a transaction between his agent and employee, and his dealer, has nothing to do with the suit brought here, by the insurer and the insurance company.

The Court: He may answer.

"A. No, never done."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. I will ask you if any of your drivers are ever [86] permitted to indorse a check payable to Supreme Trailer Company or Southwest Mobile Homes Sales Corporation?"

Mr. Johnson: To which question we object for the same reasons, that this witness should not be allowed to set out a practice between that agent and his company, his company and his dealers, as

(Deposition of Robert D. Franks.)

second and third parties, that it is irrelevant in this suit.

The Court: He may answer.

"A. No, they are not."

The Court: In line with this question, I take it, Mr. Johnson, is to show what authority the people had.

"A. No, they are not. No checks received from dealers are never cashed. They are always indorsed by a restrictive rubber stamp."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Does Supreme Trailer Company transport its trailers with its own trucks or vehicles, or does it use commercial transportation?

A. We do both, but haul the largest part ourselves.

Q. Do you know, of your own knowledge, how trailer identified by Number 6995, and reflected by Invoice marked 'D-1' (Plaintiff's Exhibit No. 6) was transported to Boise, Idaho?

A. Yes, shipped by one of our trucks, on our freight billing or Invoice 3212, dated the same date as our [87] sales invoice.

Q. Do you have the original?

A. No, it was mailed to the home office of the Aetna Trailer sales in Denver.

Q. Mr. Franks, you hand me what is identified

(Deposition of Robert D. Franks.)

as Invoice 3212, which is identified as freight bill and we will ask the reporter to mark it."

Mr. Martin: Mr. Bailiff, would you give me the Exhibit attached to page 35 of that deposition and would you have the Clerk mark this?

The Clerk: Plaintiff's Exhibit No. 16.

(The document referred to was marked Plaintiff's Exhibit No. 16, and was received in evidence.)

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. I will ask you if this is a duplicate of the original freight bill issued May 4, 1956?

A. Yes, our accounting department copy of our original billing.

Q. Was this copy made in your office and under your supervision? A. Yes, sir.

Q. Do you know what type vehicle was used to transport trailer No. 6995 to Boise, Idaho?

A. One of our regular three-quarter ton trucks."

Mr. Martin: Your Honor, I am now going to offer [88] in evidence Defendant's Exhibit No. 16.

Mr. Johnson: We have no objection, your Honor.

The Court: It may be admitted.

(The document referred to was marked Defendant's Exhibit No. 16 and was received in evidence.)

(Deposition of Robert D. Franks.)

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. A pickup?

A. Modified to our purpose.

Q. Do you know the driver of that truck?

A. Yes.

Q. Who was he?

A. Joseph Ralph Roberts.

Q. Do you know a man named Albert Pauls?

A. No.

Q. Have you ever known anyone named Albert Pauls ever to have been employed by either Supreme Trailer Company or Southwest Mobile Homes Sales Corporation?"

Mr. Johnson: To which we object on the grounds that it does not ask this witness if such employee was employed and if he knows him.

The Court: He may answer.

"A. No, not that I know of."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Mr. Franks, when your company sells a house trailer, what instrument, if any, does it deliver to the [89] purchaser to show passage of title to the trailer?"

Mr. Johnson: To which question we object on the grounds that it is irrelevant, immaterial to this lawsuit, and further that it would be irrelevant and immaterial to any suit as to establish anything which might be used to create legal parties.

(Deposition of Robert D. Franks.)

The Court: He may answer.

"A. We furnish upon receipt of payment a manufacturer's certificate of origin, which is a sales form identical to that of any automobile manufacturing company, with the exception in the upper lefthand corner it says, 'Semi-trailer, House Car.' "

Mr. Martin: Mr. Bailiff, would you please give to me the instrument on page 36 of the deposition?

The Clerk: Marked as Defendant's Exhibit No. 17 for identification.

(The document referred to was marked Defendant's Exhibit No. 17 for identification.)

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. I hand you what has been identified as D-3, (Defendant's Exhibit No. 17) and ask if this is the certificate of origin that you refer to?

A. Yes, sir.

Q. State if this certificate is issued in compliance with the Motor Vehicle Statutes of the State of Texas? [90]

Mr. Johnson: To which question we object upon the grounds that this calls for a conclusion and it also calls for a conclusion of fact as well as a conclusion of law, and this certificate has not been shown to be the certificate that was actually involved in the sale—excuse me, the delivery of the trailer No. 6955.

(Deposition of Robert D. Franks.)

The Court: As I understand it, Gentlemen, it is admitted that there was no certificate of title issued by this company, or anyone else.

Mr. Martin: That is the defense in this case.

The Court: Why is this material, that is admitted as far as I understand, the defendant has admitted that no certificate of title from this company for this trailer. I am going to sustain the objection. I do not think that it is material. That is a fact that is not disputed.

Mr. Martin: We will withdraw Defendant's Exhibit No. 17.

The Court: Very well.

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. When is this certificate issued to the dealer?

A. Upon receipt of payment.

Q. Is this certificate ever issued prior to payment?

A. No, generally, they are not even typed up until payment is received [91]

Q. Are all certificates of origin reflecting the sale of trailers prepared in your office?

A. Yes.

Q. Prepared by you or under your direct supervision? A. That's right.

Q. Mr. Franks, with reference to 'D-1' (now known as Plaintiff's Exhibit No. 6) which is invoice

(Deposition of Robert D. Franks.)

2905, showing transportation of a trailer to Aetna Trailer Sales at Boise, Idaho, I will ask you to state if any certificate of origin has ever been issued by Supreme Trailer Company or Southwest Mobile Homes Corporation to Aetna Sales—Aetna Trailer Sales, reflecting the sale of this trailer?

A. No, never been a certificate issued to that.

Q. Has a certificate been issued to any other person or agency? A. It has.

Q. To whom was it issued?

A. Certificate of origin was issued to Great American Indemnity.

Q. Can you state approximately when that certificate was issued?

A. Yes, issued on receipt of check from Great American Indemnity who was our bonding agent.

Q. Mr. Franks, was a certificate of origin on trailer No. 6995 issued to Great American Indemnity several [92] months after May 4, 1956, and approximately two or three months ago?

A. Yes, that's correct.

Q. Why was a certificate of origin issued to Great American Indemnity?"

Mr. Johnson: To which question we object on the grounds that it is incompetent, irrelevant, and immaterial; that the—it invades the province of the Judge in the case as part of the fact, that the reason, if any, is fully immaterial.

The Court: I do not see the materiality of that, Mr. Martin.

(Deposition of Robert D. Franks.)

Mr. Martin: Your Honor, it has now been admitted in the case that it was never issued to the plaintiff, Beatrice Nelson, it was issued to the Great American Indemnity Company. The witness has already testified that it is issued on receipt of payment and we think it is material to show that point.

The Court: He may answer. I will give it such consideration as I deem necessary.

"A. Our drivers were bonded by Great American Indemnity, inasmuch as they handle both valuable merchandise and frequently return checks to the factory, and Mr. Joseph Roberts had been bonded and loss had been sustained by us inasmuch as we could not locate this mobile home, although [93] we did recover the truck from which it had been delivered in Boise."

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. The trailer as reflected by 'D-1' (now known as Plaintiff's Exhibit No. 6), which was to be transported to Boise, Idaho, to Aetna Trailer Sales was transported by Joseph Roberts by a company truck, is that correct? A. Yes.

Q. Was that trailer ever delivered to Aetna Trailer Sales at Boise? A. No, it was not.

Q. Has that trailer ever been recovered by either of your companies? A. No, sir.

Q. Was a claim for loss of the trailer filed with Great American Indemnity? A. Yes, sir.

(Deposition of Robert D. Franks.)

Q. Did that company pay the amount of your loss? A. Yes, sir.

Q. After that was a certificate of origin issued to Great American Indemnity? A. Yes.

Q. Do you know where Joseph Roberts is now?

A. No, sir.

Q. Have you or any of your employees heard from him [94] since he left Bonham to transport the trailer we have been talking about to Idaho?

A. He contacted Mr. Riley once or twice for funds.

Q. Have you or any of your people heard from him since?

A. No, not since his actual departure from the factory area.

Q. Do you know what instruments, with reference to invoices, freight bills, etc., he had in his possession when he was delivering this trailer to Idaho?

A. Yes, sir. Due to the fact the Aetna Trailer Sales at Boise is a sales lot only and have no accounting or payment function, the only papers went with the trailer in this case were a copy of the invoice and an inspection report, which was in two copies. The inspection report was for Mr. Roberts to have the branch manager sign to verify delivery and duplicate invoice was my information copy for the branch manager so he would know how to price the merchandise after receiving it. The original papers, the original invoice and freight bill were

(Deposition of Robert D. Franks.)

mailed to Denver, to the Denver office of Aetna Trailer Sales for payment, when they would be notified by their branch manager he had received the trailer as ordered and in good condition. The branch manager doesn't have authority to disburse funds other than petty cash funds. All payments and records are [95] held in the Denver office and, therefore, we look to the Denver office for payment and had not furnished the original invoice with the driver—had not furnished the driver with the original—for the Boise location."

Mr. Johnson: To correct the record, on the question read to the witness, or copy reads, "Do you know what instruments, with reference to invoices, freight bills, etc., he had in his possession when he was delivering this trailer to Idaho?" Not Boise?

Mr. Martin: Did I say Boise?

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. I note that Defendant's Exhibit 1" (now known as Plaintiff's Exhibit No. 6), "contains this language: 'In the event of payment by check other than a cashier's check or a certified check, it is expressly understood that title shall remain in the seller until said check is honored.' Is that language on all your invoices?

A. Copies are printed the same way as the originals.

(Deposition of Robert D. Franks.)

Q. Do either of your companies sell trailers to the ultimate user?

A. No, wholesale only. We do not sell retail to individual buyers.

Q. You sell only to dealers?

A. Yes, that's right.

Q. Mr. Franks, in some instances, your drivers are [96] instructed not to deliver a trailer unless payment is received at the time of delivery, is that correct? A. Yes, it is.

Q. How are the drivers instructed to receive payment? A. By check only.

Q. How are your dealers instructed to pay for trailers? A. By check only.

Q. To whom are the checks payable?

A. To the Southwest Mobile Homes Sales Corporation.

Q. With reference to the sale of trailer No. 6995, to Aetna Trailer Sales, am I correct in assuming you would have received payment by check from the Denver office when the Boise office had notified the Denver office of the receipt of the trailer?''

Mr. Johnson: To which we object on the ground that it is assuming facts not in evidence and it is also not warranted by the evidence, and also asking the witness for what would have been, rather than what actually happened.

The Court: Objection sustained.

(Deposition of Robert D. Franks.)

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Are your drivers ever permitted to accept money as distinguished from a check for the delivery of a trailer? [97]

A. No, that is not permitted.

Q. Are your drivers ever permitted to sell or negotiate the sale of a trailer?

A. No, their only function is to make delivery. We have a separate sales force that would make the negotiation.

Q. Am I correct in assuming all sales are made by salesmen of Supreme Trailer Company at Bonham, Texas?

A. They are made by salesmen and subject to approval of my office.

Q. Was Mr. Roberts a salesman for Supreme Trailer Company or Southwest Mobile Homes Sales Corporation? A. No, sir.

Q. Approximately, how many motor vehicles does your company use for the transportation of trailers?

A. About twenty to twenty-two.

Q. I will ask you to state if those vehicles have lettering or identification on them reflecting their ownership?

A. All we have now do, and in the past not all were lettered, but the greater number of them had both our name and the local and State permit numbers printed on the doors.

(Deposition of Robert D. Franks.)

Q. What do you mean by the name being printed, what name? [98]

A. Supreme Trailer Company, Bonham, Texas.

Q. State, if you know, whether the pickup truck used by Joseph Roberts to transport trailer No. 6995 had the lettering on the cab 'Supreme Trailer Company, Bonham, Texas'?

A. I couldn't say for sure if that was lettered as our present custom, or not.

Q. Do you have that vehicle?

A. No, we had since traded it in, sometime last fall.

Q. Has Mr. Roberts ever returned to Bonham?

A. No, he left the vehicle in Boise and we didn't even know he got to Boise until we were notified by the police department that the truck had been parked several days in the same location.

Q. If he didn't return the vehicle, how did you get it?

A. We sent a replacement mobile home to Boise to complete our sales transaction with Aetna and with the second a towing vehicle that returned the one driven by Mr. Roberts.

Q. How did you locate the vehicle driven to Idaho by him?

A. The police department notified us that one of our vehicles was parked for several days unattended.

Q. Do you know if you or any representative of your [99] company has filed a complaint against

(Deposition of Robert D. Franks.)

Joseph Roberts charging him with embezzlement of the trailer? A. Yes, I believe we have."

Mr. Johnson: To which we ask that the answer be stricken, the question not definitely stating whether or not such action was filed.

The Court: It may stand.

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Who filed it?

A. I believe Mr. Riley did and I probably signed it.

Q. Do you know if the warrant is outstanding for the arrest of Joseph Roberts, if there is a warrant outstanding for his arrest?

A. Yes, I believe so.

Q. Do you know if he had been apprehended under that warrant?

A. To my knowledge, no.

Q. Do you know Beatrice Nelson, plaintiff in a cause pending in the United States District Court for the District of Idaho, Eastern Division, No. 2012; do you know Beatrice Nelson? A. No.

Q. Have you ever had communication with her in any way? [100] A. No.

Q. Have you ever seen her? A. No.

Q. Has your company or either of them ever sold a trailer of any kind to Beatrice Nelson?

A. No, sir.

Q. Did Joseph R. Roberts have any authority to

(Deposition of Robert D. Franks.)

sell trailer No. 6995, identified as Defendant's Exhibit 1, (now known as Plaintiff's Exhibit No. 6) to Beatrice Nelson?

A. No, his instruction was to deliver it to Aetna Trailer Sales at their Boise, Idaho, location.

Q. Did Joseph R. Roberts ever have authority to deliver that trailer to Beatrice Nelson?

A. No, he did not.

Q. Mr. Franks, again I call your attention to the language of Defendant's Exhibit No. 1, (now known as Plaintiff's Exhibit No. 6) which states: 'In the event of payment by check other than a cashier's check or a certified check, it is expressly understood that title shall remain in the seller until said check is honored,' and ask you to state if Supreme Trailer Company or Southwest Mobile Homes Sales Corporation ever transfer the title to a trailer before payment is received?

A. No, they do not.

Q. I will ask you to state also, if the issuance of [101] the certificate of origin, identified as Defendant's Exhibit 3——"

Mr. Martin: It is not in evidence, I will change the question, your Honor, may I withdraw that question?

The Court: Yes, you may.

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. I will ask you to state also, if the issuance

(Deposition of Robert D. Franks.)

of the certificate of origin, is the only way and the exclusive way that the title to a trailer is transferred?"

Mr. Johnson: Now, we object to the question on the ground that it is invading the province of the tryer of the fact, it is a question of fact of law and this witness is not competent to give an opinion.

The Court: He may answer. It goes to show how they transfer title.

Mr. Johnson: Yes.

"A. It is."

Mr. Southerland:

(Read by Mr. Martin):

"I believe that's all."

The Court: Will you identify the deposition?

Mr. Martin: This is the deposition of Leonard Riley, your Honor.

The Court: Very well. [102]

LEONARD RILEY

the deposition of Leonard Riley was read as follows, the questions in the deposition having been asked by Mr. Edward Southerland.

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Please state your name?

A. My name is Leonard Riley.

Q. Where do you live, Mr. Riley?

(Deposition of Leonard Riley.)

A. 256 Graham Street, Bonham.

Q. How long have you lived in Bonham?

A. Approximately eighteen months.

Q. Where did you live before that?

A. Chalmers, Indiana.

Q. How old are you, Mr. Riley?

A. Thirty-four.

Q. What position, if any, do you hold with Supreme Trailer Company or Southwest Mobile Homes Sales Corporation?

A. I am transport supervisor.

Q. Where is the home office of Supreme Trailer Company? A. Bonham, Texas.

Q. Where in Bonham, with reference to location?

A. Just north of town on U. S. Highway 78, at Jones Field.

Q. Both companies occupy the same building and have [103] the same personnel?

A. They do.

Q. As transport supervisor, what are your official duties?

A. I am responsible for delivering mobile homes to all parts of the United States, to our dealers in the United States.

Q. Were you transport supervisor on May 4, 1956? A. Yes, sir.

Q. Do you have clerical personnel working under you? A. Yes.

Q. Do you maintain certain records or are certain records maintained under your direct supervision? A. Yes, sir.

(Deposition of Leonard Riley.)

Q. What records are maintained by your office?

A. All records pertaining to transportation.

Q. What does Supreme Trailer Company manufacture? A. Mostly mobile homes.

Q. Also referred to as house trailers?

A. Yes, sir.

Q. I believe you stated Supreme Trailer Company manufactures mobile homes? A. Yes.

Q. Which corporation sells the mobile homes?

A. Southwest Mobile Homes Sales Corporation.

Q. In a technical sense, are you the transport supervisor of Southwest Mobile Homes Sales Corporation? A. Yes.

Q. Does your company sell trailers to dealers?

A. Yes.

Q. Does your company sell trailers to individual users—sell them at retail?

A. We do not sell retail.

Q. I will ask you to state, since you have been connected with Supreme Trailer Company and Southwest Mobile Homes Sales Corporation, has either company made sales to Aetna Trailer Sales?

A. Yes, they have.

Q. Where is the home office of Aetna Trailer Sales, if you know?

A. At the present time, Salt Lake City.

Q. I will ask you if the company has a subordinate office or sales agency? A. Yes.

Q. Does the company have a sales agency at Boise, Idaho? A. Yes.

(Deposition of Leonard Riley.)

Q. How does your company transport to the dealer its mobile homes? [105]

A. We have our own trucks for the transportation.

Q. What type truck do you use?

A. We have used Fords and Chevrolets and GMC's, three-quarter ton to a ton. We have had two-ton trucks.

Q. Is the trailer pulled behind the truck?

A. Yes.

Q. Is it customary for the driver to pull anything on his return trip?

A. No, not customary.

Q. I will ask you to state if on or about May 4, 1956, you issued instructions for the transportation of a house trailer to Aetna Trailer Sales at Boise, Idaho? A. Yes, I did.

Q. I hand you what has been identified as Defendant's Exhibit 1," (now known as Plaintiff's Exhibit No. 6) "and ask you to state what that is.

A. Invoice for trailer No. 6995.

Q. To be delivered where?

A. To Aetna Trailer Sales, Boise, Idaho.

Q. In whose office was this invoice prepared?

A. In the sales office—Mr. Franks' office.

Q. What do your records show with reference to the transportation of this vehicle, No. 6995, to Aetna Trailer Sales at Boise, Idaho?

A. Driver assigned to take that trailer was [106] Joseph R. Roberts.

(Deposition of Leonard Riley.)

Q. Was Joseph R. Roberts an employee — one of your employees? A. Yes, he was.

Q. Do you know approximately how long he had been working for the company?

A. He was hired on or about March 28, 1956.

Q. Had he made other trips for the company?

A. Yes.

Q. Do you know a man by the name of Albert Pauls? A. No.

Q. Have you made examination of the Personnel Records of Supreme Trailer Company and Southwest Mobile Homes Sales Corporation to determine if any person named Albert Pauls has ever been employed by either company at the Bonham plant? A. Yes, I have.

Q. Has any such person ever been employed by either company at the Bonham plant?

A. We have no record of it.

Q. When Joseph R. Roberts left Bonham, Texas, with your company's truck and trailer No. 6995, what written instruments did he carry with him?

A. He carried final inspection sheet, a copy of the trailer invoice, and a copy of the freight bill.

Q. All right.

A. Inspection sheet, copy of invoice, and freight bill copy.

Q. What is the final inspection report?

A. That is a report prepared by production line, listing equipment in the trailer, and is used to signify the trailer is ready for shipment.

(Deposition of Leonard Riley.)

Q. Is the driver required to bring back the final inspection report signed by the consignee?

A. Yes.

Q. If, in any instance, the trailer is damaged in transit, is such damage supposed to be reflected on the final inspection report as signed by the consignee?

A. Yes, the dealer will mark any damage or changes on the inspection sheet that is returned to us.

Q. Do you have the original or an exact copy of the final inspection sheet Mr. Roberts carried with him on or about May 4, 1956, when he left Bonham?

A. I have a duplicate copy.

Q. Do you know where the original is?

A. No.

Q. Is the copy you have an exact duplicate of the original? A. Yes.

Q. Was it made at the same time? [108]

A. Yes."

Mr. Martin: Mr. Bailiff, would you please hand to the Clerk the instrument which is attached to page 37 of the deposition?

The Clerk: Marked as Defendant's Exhibit No. 18 for identification.

(The document referred to was marked Defendant's Exhibit No. 18 for identification.)

By Mr. Southerland:

(Read by Mr. Martin.)

(Deposition of Leonard Riley.)

"Q. Mr. Riley, I hand you what has been identified as D-4," (now known as Defendant's Exhibit No. 18 for identification) "which is a final inspection sheet, and ask you if the signature 'Joseph R. Roberts' is the signature of your driver, Joseph R. Roberts?

A. Joseph R. Roberts signed this inspection sheet, yes.

Q. Did he sign it before he left Bonham?

A. Yes, he did.

Q. With reference to the penciled notation on it, I will ask you if that was made at the time the original inspection sheet was issued by you, or later?

A. It was made by me later — the penciled notations were."

Mr. Martin: We now offer that inspection sheet as Defendant's Exhibit 18 in evidence. [109]

Mr. Johnson: We have no objection, your Honor.

The Court: It may be admitted.

(The document referred to was marked Defendant's Exhibit No. 18 and was received in evidence.)

By Mr. Southerland:

(Read by Mr. Martin.)

"Q. Approximately how many trailers have you shipped to Aetna Trailer Sales at Denver, or its branch offices, since you have been employed at the Bonham plant?

(Deposition of Leonard Riley.)

A. I do not remember the exact number—quite a few.

Q. I will ask you to state, if you know, what happened to the original invoice No. 2905, reflecting transportation of the trailer on May 4, 1956?

A. It was mailed to the main office of Aetna Trailer Sales at Denver, Colorado.

Q. In May, 1956, did Aetna Trailer Sales maintain an account with your company? A. Yes.

Q. Did it pay for a trailer as it was received and delivered?

A. The trailer was received on a branch lot, and that lot manager would notify the main office of the delivery of the trailer and the main office in turn would pay our company.

Q. How would payment be made? [110]

A. By check.

Q. I will ask you to state, if you know, whether it is the policy of Supreme Trailer Company or Southwest Mobile Homes Corporation to transfer title to a trailer before payment is received?

A. No, it is not.

Q. How does your company, or companies, transfer title to a trailer?

A. The company issues a Certificate of Origin.

Q. Are those certificates issued by you or in your office? A. No.

Q. In whose office are they issued?

A. Issued in Mr. Franks' office.

(Deposition of Leonard Riley.)

Q. How are your drivers paid, on a monthly salary? A. By mileage.

Q. You also pay their expenses while they are on the road?

A. Living expenses we don't pay, truck expenses we do pay.

Q. State if your drivers are ever permitted to collect for a trailer when it is delivered.

A. They are never permitted to collect cash for the trailer, although, at times, they are instructed to return the check made payable to the company. [111]

Q. Are your drivers ever permitted to endorse or cash any check payable to Supreme Trailer Company or Southwest Mobile Homes Sales Corporation? A. No.

Q. Are your drivers ever permitted to accept payment by check payable to the driver?

A. No.

Q. Mr. Riley, I believe you have testified that Mr. Roberts had in his possession in May, 1956, when he was delivering trailer No. 6995 to Boise, a duplicate copy of the invoice, and freight bill, and final inspection sheet in duplicate, is that correct?

A. Yes.

Q. I will ask you to state if Joseph Roberts had any other instruments issued by any department of Supreme Trailer Company or Southwest Mobile Homes Sales Corporation, which would indicate that he, as the driver, had any authority to sell the trailer and collect the money therefor?

(Deposition of Leonard Riley.)

A. No, sir.

Q. What were Joseph Roberts' duties?

A. His duty was to deliver the trailer to the dealer to which it was consigned and get the dealer to sign for the trailer and to return to Bonham.

Q. Do you know Albert Pauls? [112]

A. No, sir.

Q. Did he ever work for either of your companies?

A. To my knowledge, he never has.

Q. Now, Mr. Riley, was trailer No. 6995, as reflected by Defendant's Exhibit 1" (now known as Plaintiff's Exhibit No. 6), "ever delivered to Aetna Trailer Sales at Boise, Idaho? A. It was not.

Q. Did you have any communication with Joseph Roberts after he left Bonham, Texas, on or about May 4, 1956? A. Yes, sir.

Q. What was the nature of that communication?

A. On or about May 10, Joseph Roberts called from Raton, New Mexico, and advised me he was having trouble with his truck and requested that some money be wired to him, and I sent him fifty dollars by Western Union. On May 14, Mr. Roberts wired from Colorado Springs, Colorado, that he needed another sixty dollars and would pick it up in Colorado Springs. I wired him the money to Colorado Springs. On May 16, Mr. Roberts wired for an additional sixty dollars. This wire was from American Falls, Idaho. When I received this wire, I wired Mr. Roberts asking him what his trouble

(Deposition of Leonard Riley.)

was, and in reply I received a wire which stated he was still having trouble with his truck. On [113] May 17, I sent Mr. Roberts sixty dollars to American Falls.

Q. Did you have any communication with Joseph Roberts after May 17?

A. I have not heard from him since May 17.

Q. State what the practice is; is it the practice of your company to send only one driver when a trailer is to be delivered? A. Yes, sir.

Q. Did Joseph Roberts have any authority to take anyone with him on his trip to Idaho?

A. No, sir.

Q. Do your company's rules prohibit a driver from taking any passengers?

A. They do, yes, sir.

Q. How did you learn that trailer, No. 6995, was never delivered to Aetna Trailer Sales at Boise, Idaho?

A. I called the dealer in Boise of Aetna Trailer Sales.

Q. And you were informed over the telephone the trailer had not been delivered?

A. Yes, sir.

Q. Then, what did you do?

A. About two days later I called Boise City Police and reported the matter to them and asked them to keep a lookout for Joseph Roberts and the trailer. [114]

Q. Did the City Police ever make a report to you with reference to the trailer or truck?

(Deposition of Leonard Riley.)

A. No, they didn't.

Q. Has the truck ever been recovered?

A. Yes, sir.

Q. How was it recovered?

A. We were notified by the Chief of Police at Garden City, Idaho. They notified me the truck was stored at Tommie's Auto Wrecking Company.

Q. At what town?

A. Garden City, Idaho.

Q. Did you then send for the truck?

A. Yes, sir.

Q. Was it returned to Bonham? A. Yes.

Q. Is it still owned by the company or has it been sold? A. It has been sold.

Q. Has trailer 6995 ever been recovered by Supreme Trailer Company or Southwest Mobile Homes Sales Corporation? A. No, sir.

Q. To this date, has trailer No. 6995 ever been delivered to Aetna Trailer Sales at Boise, Idaho?

A. To my knowledge, it hasn't. [115]

Q. I will ask you to state whether or not your company had extensive search made in Idaho to locate the trailer and truck?

A. Yes, we did.

Q. I will ask you to state if a complaint has been filed against Joseph R. Roberts for embezzlement of the trailer? A. Yes, sir.

Q. Do you know who signed the complaint?

A. I did.

Q. I will ask you to state if a warrant has been

(Deposition of Leonard Riley.)

issued for the arrest of Joseph R. Roberts?

A. Yes, sir.

Q. Do you know if that warrant has ever been served? A. I don't know.

Q. Do you know if Joseph R. Roberts has ever been apprehended?

A. To my knowledge, he has not.

Q. Has Joseph R. Roberts returned to Bonham since May, 1956?

A. No, not to my knowledge.

Q. To your knowledge has he returned to Bonham since May, 1956? A. No. [116]

Q. Does he have any money coming to him from your company, or is he overdrawn?

A. Until Joseph Roberts would have returned all expense tickets, it is unknown whether we owed him or he owed us.

Q. Is it your company's policy to bond all your drivers? A. Yes, sir.

Q. Was Joseph Roberts bonded by a surety company? A. Yes, he was.

Q. Do you know if the surety company has paid Supreme Trailer Company or Southwest Mobile Homes Sales Corporation for the loss of the trailer No. 6995? A. They have.

Q. Do you know the name of that surety company? A. Great American Indemnity.

Q. Do you know a lady by the name of Beatrice Nelson? A. No, sir.

Q. Have you had any communication from a

(Deposition of Leonard Riley.)

lady named Beatrice Nelson who lives in the State of Idaho? A. No.

Q. Do you know if the truck driven by Joseph Roberts to transport trailer 6995 to Boise, Idaho, bore any lettering on the cab to identify it as being owned by either Supreme [117] Trailer Company or Southwest Mobile Homes Sales Corporation?

A. I do not know.

Q. Do all the company's trucks now bear such lettering? A. Yes, they do.

Q. In May, 1956, did the company's trucks bear such lettering?

A. No, part of them were lettered and part were not.

Q. I hand you what has been identified as "D-1," (now known as Plaintiff's Exhibit No. 6), "D-2," (now known as Defendant's Exhibit No. 16) "and D-4" (now known as Defendant's Exhibit No. 18), "and ask you to state if each of these exhibits is a carbon copy of the original, made at the same time as the original was made?

A. Yes, they are except for my penciled lettering on Exhibit 4, the Final Inspection Sheet."

Mr. Martin: For the record, Exhibit 4 is Defendant's Exhibit No. 18.

Mr. Southerland (Read by Mr. Martin): "All right, that will be all."

Mr. Martin: We now offer the complete deposition into the record, for the convenience of the Court, other than that portion which the Court sustained.

(Deposition of Leonard Riley.)

Mr. Johnson: If the Court please, we have [118] no objection taking a copy of the deposition.

The Court: The deposition is in the record, the Reporter took it.

Mr. Martin: Yes, I know, your Honor, but——

The Court: I will probably refer to it.

Mr. Martin: The defense rests.

Mr. Johnson: If it please the court, at this time could we have a five minute recess?

The Court: Yes, we will take a short recess.

(The Court took a short recess.)

Mr. Johnson: At this time, your Honor, we would like to call Mr. Dan Bates.

The Court: This is rebuttal, I take it.

DANIEL H. BATES

recalled as a witness, in rebuttal, testified as follows:

The Clerk: You have been sworn, just take the witness stand, please.

By Mr. Johnson:

Q. Mr. Bates, you are the Mr. Bates that was sworn this morning, is that correct?

A. Yes, sir.

Q. And, carrying your mind back to May 17, 1956, that day that you met Joseph Roberts and Albert Pauls, on that date, in the company of Joseph Roberts did you visit [119] Judge Loofborrow's office in American Falls?

A. Yes, sir.

Q. And what was said at that time between Beatrice Nelson and Judge Loofborrow?

Mr. Martin: To which we object, your Honor, it is not proper rebuttal.

The Court: The objection will be sustained.

Mr. Johnson: If it please the Court, we are attempting to show what actually did happen rather than through hearsay was testified happened at the meeting between Judge Loofborrow and Beatrice Nelson.

Mr. Martin: If the Court please, that was his case in chief this morning when he had this witness on the stand, we still object to that as improper rebuttal, irrespective of what he is trying to do.

Mr. Johnson: The witness established at that

(Testimony of Daniel H. Bates.)

time that Mr. Roberts was an employee and agent of the defendant, that came out through the deposition.

The Court: He may answer for what it is worth.

Q. (By Mr. Johnson): What conversation did take place at that time?

Mr. Martin: Does the record show that I have my objection as being improper rebuttal?

The Court: Yes.

Mr. Martin: I further object to this [120] question as being hearsay as to the defendant and not binding on the defendant.

Mr. Johnson: This question is aimed only at showing what actually did take place regarding what the defendant has shown through Stan Smith was said to have taken place at a certain time. This is merely to corroborate the plaintiff in her testimony as to what actually did take place.

Mr. Martin: We submit, your Honor, that is his case in chief.

The Court: Objection sustained. You should have corroborated your client and your case in chief.

Mr. Johnson: We have no further questions of this witness.

Mr. Martin: No questions.

(The witness left the stand.)

Mr. Johnson: At this time I would like to call Beatrice Nelson.

BEATRICE NELSON

recalled as a witness, in rebuttal, testified as follows:

By Mr. Johnson:

Q. You are the plaintiff in this law suit?

A. Yes, sir.

Q. And were sworn this morning? [121]

A. Yes, sir.

Q. This morning Mr. Martin asked you the question regarding a law suit involving this trailer, other than this one. Mrs. Nelson, was a suit ever filed against you by Supreme Trailer Company, Southwest Mobile Homes Sales Company, or Great American Indemnity Company on this trailer?

A. No, sir.

Q. Did you eventually sell this particular trailer house to any one in the year 1957?

Mr. Martin: To which we object as being improper rebuttal, not having anything to do with the issues in this case; it is incompetent, irrelevant, and immaterial.

The Court: She may answer, I do not know what the value is.

Q. (By Mr. Johnson): Did you sell it to anyone? A. Yes, sir.

Mr. Johnson: We have no further questions, Your Honor.

Mr. Martin: No further questions.

(The witness left the stand.)

Mr. Johnson: We now rest, your Honor.

Mr. Martin: Nothing further, your Honor.

The Court: Very well. How do you gentlemen want [122] to handle this matter, do you want to argue it orally?

Mr. Martin: I would prefer to submit it on a brief, your Honor.

Mr. Johnson: Whatever is most convenient with the Court, either way.

The Court: You have a legal question, more than anything else. The record may show that oral argument is waived and the case will be submitted on briefs.

[Endorsed]: Filed March 20, 1958. [123]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Petition for removal (copy of complaint attached).

2. Certified copies from Clerk of the District Court (copies of complaint and order of removal attached).

3. Amended complaint.
4. Motion to amend complaint.
5. Stipulation and order to amend complaint.
6. Motion to dismiss.
7. Record of hearing of May 2, 1957.
8. Answer.
9. Plaintiff's request for admissions filed Feb. 26, 1957.
10. Defendant's response to request for admissions, filed April 2, 1957.
11. Plaintiff's request for admissions, filed Aug. 14, 1957.
12. Defendant's answer to request for admissions, filed Aug. 20, 1957.
13. Plaintiff's request for admissions, filed Oct. 4, 1957.
14. Defendant's answer to request for admissions, filed Nov. 12, 1957.
15. Plaintiff's interrogatories, filed Oct. 4, 1957.
16. Defendant's answer to interrogatories, filed Nov. 12, 1957.
17. Transcript of testimony.
18. Plaintiff's exhibits 1, 2, 3, 4, 5, 6 and 14; and Defendant's exhibits 8, 9, 10, 11, 16 and 18.
19. Findings of fact and conclusions of law, filed Feb. 17, 1958.
20. Judgment, filed Feb. 17, 1958.
21. Notice of appeal.
22. Bond for costs on appeal.
23. Designation of contents of record on appeal.
24. Statement of points on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 18th day of April, 1958.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 15999. United States Court of Appeals for the Ninth Circuit. Beatrice Nelson, Appellant, vs. New Hampshire Fire Insurance Company, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Idaho, Eastern Division.

Filed: April 21, 1958.

Docketed: April 28, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15999

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Respondent.

APPELLANT'S STATEMENT OF POINTS

Plaintiff-appellant herewith presents her statement of points upon which she will rely on the Appeal in this matter.

I.

That the trial court erred in entering judgment in favor of the defendant and against the plaintiff.

II.

The trial Court erred in holding and finding relevant, in determining the contractual rights and duties between an insured and an insurer, the title questions between insured and third parties concerning subject trailer house in possession of insured both at the time of issuance of policy and the date of loss, and otherwise failing to recognize the difference between a title contest over personal property and a contractual claim based on an insurance policy.

III.

That the trial court erred:

(a) In finding of fact VI in holding and finding that "The plaintiff knew or by the exercise of any degree of care or caution should have known that neither the said Roberts nor the said Pauls had any right, title or interest in or to said trailer house or any right to sell or dispose of the same and that the plaintiff herein was not an innocent purchaser of said trailer house or a purchaser for value." For the reasons that the evidence does not support said findings and the evidence is uncontradicted that plaintiff was a purchaser without knowledge of any encumbrance or title defect paying $2,000.00 consideration for the trailer house therefore being unequivocally an innocent purchaser for value under the law of the State of Idaho.

(b) In finding of fact X in holding and finding the defendant timely tendered back to the plaintiff the premium she had paid for the insurance policy as the evidence is to the contrary.

(c) In finding of fact IX in holding and finding "that at the time the plaintiff applied for and procured said policy of insurance, she had no insurable interest in said trailer house" as the evidence is to the contrary.

(d) In finding of fact XI in holding and finding that: "That the plaintiff had no insurable interest in said trailer house at the time of the oc-

currence of the fire and has no claim whatsoever upon or against the defendant by reason of said insurance policy'' as the evidence is to the contrary.

IV.

That the evidence discloses without contradiction the plaintiff entitled to recover $4,627.50 under the terms of the contract of insurance, and reasonable attorney fees for prosecution of this action.

V.

That the evidence is wholly insufficient to support any affirmative defenses of defendant and thus to support the judgment entered.

VI.

The Court erred in not holding and finding the defendant waived or was estopped to assert any affirmative defense or defenses to payment of the risk insured against for the reasons no proper proof was adduced in support thereof and no timely tender back of premium was made to plaintiff.

VII.

That the Court erred in Conclusion of Law number I, for the reason that Joseph Roberts had apparent authority to pass title and in any event plaintiff by said purchase acquired an insurable interest in and to said trailer house.

VIII.

That the Court erred in Conclusions of Law number II and number III, for the reasons that plaintiff at the relevant dates having actual possession,

bill of sale and other incidents of ownership had therefore an insurable interest in such trailer house.

IX.

That the Court erred in finding of fact VIII to the effect that there was no disclosure to defendant by the plaintiff of the facts of the purchase of the trailer house for the reason that there is no evidence of any refusal by plaintiff to answer any inquiry of defendant concerning said facts of purchase or any other facts.

X.

That the cause having been determined and governed by the rules of law of the state of Idaho, it was the duty of the Court to follow such rules of law, and said rules of law of Idaho provide that a title certificate is not a condition necessary to acquiring title or actual ownership of a motor vehicle and an insurance policy is to be construed liberally in favor of the insured.

XI.

That the cause having been determined and governed by the rules of law of the State of Idaho, it was the duty of the Court to follow such rules of law, and said rules of law of Idaho provide by definition that an insurable interest is any interest in property or in relation thereto or liability in respect thereof and that the plaintiff insured need not prove existence of insurable interest and the burden to show lack of insurable interest, if any, is upon the defendant insurer, and in this cause

there is no evidence showing the plaintiff did not have an insurable interest.

XII.

That the Court further erred in conclusions of law I, II, III, IV, V, and VI, each and all of them for the reasons set forth above herein and that the same are against the law and evidence.

XIII.

That the judgment entered is against the law for the reasons set forth herein and is unconscionable and abridges the freedom and rights of the parties to contract.

Dated this twenty-fifth day of April, 1958.

GEORGE R. PHILLIPS,
JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Appellant.

[Endorsed]: Filed April 28, 1958.

[Title of Court of Appeals and Cause.]

MOTION

Comes now the appellant in the above-entitled cause and moves for an order permitting all exhibits in the above-entitled cause, being plaintiff's exhibits 1, 2, 3, 4, 5, 6 and 14 and defendant's exhibits 8, 9, 10, 11, 16 and 18, to be in their original form or typed copy thereof now in the record

to be considered by and before this Court on appeal and not be printed in the record.

GEORGE R. PHILLIPS,
JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Appellant.

[Title of Court of Appeals and Cause.]

STIPULATION

It is stipulated by and between the parties through their attorneys of record that Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 14 and Defendant's Exhibits 8, 9, 10, 11, 16 and 18 may be considered by this court in their original form or typed copies thereof in the record to be considered by and be before the court and need not be printed in the record.

Dated this twenty-fifth day of April, 1958.

JOHNSON AND OLSON,

By /s/ L. CHARLES JOHNSON,
Attorneys for Plaintiff-Appellant

/s/ C. BEN MARTIN,
Attorneys for Defendant-Appellee.

Service of copy acknowledged.

[Endorsed]: Filed May 5, 1958.

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

L. CHARLES JOHNSON
GEORGE R. PHILLIPS
Residence: Pocatello, Idaho
Attorneys for Appellant

FILED
JUL 21 1958
PAUL P. O'BRIEN, CLERK

GATEWAY PRINTERS—POCATELLO

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

L. CHARLES JOHNSON
GEORGE R. PHILLIPS
Residence: Pocatello, Idaho
Attorneys for Appellant

SUBJECT INDEX

Page

Statement of Pleadings and Jurisdiction 1

Questions Presented 2-4

Statement of Facts 4-10

Specification of Errors 10-13

Argument 13-62

1. Summary 13-15
2. Definition of insurable interest under Idaho law 15-23
3. A Certificate of Title is not necessary to acquire insurable interest in a trailer home 24-43
4. Apparent authority binds a principal 43-45
5. Forfeiture of insurance rights are abhorred and after payment of premium dis-allowed (45), (49-51)
6. Findings of facts and conclusions of law considered 45-48
7. The facts do not sustain fraud to avoid the contract 48-49
8. Appellee estopped to deny liability 52-58
9. Guideposts to Idaho law 58-60
10. Appellee failed to void policy by terms thereof 61
11. Conclusion 61-62

Appendix 63

TABLE OF AUTHORITIES

Cases Cited:

Page

Ailen vs. Phoenix Association Co.,
12 Ida. 652, 88 Pac. 245 19, 24, 31

Alliance Insurance Co. vs. Enders,
293 Fed. 485 30

Alliance Insurance Company vs. Williamson,
36 Ga. App. 137 S.E. 277 36

Al's Auto Sales vs. Moskowitz,
203 Okl. 611, 224 P2d 588, 591, 592 40

American Lloyds vs. Gengo,
282 S.W. 957 29

Baird vs. Fidelity-Phenix Fire Ins. Co.,
178 Tenn. 653, 162 S.W. 2d 384 22

Banner Laundry Co. vs. Great Eastern Casualty Co.,
148 Minn. 29, 180 N.W. 997 20

Barnett vs. London Assur. Corp.,
138 Wash. 673, 245 Pac. 3 23

Bird vs. Central Manufacturers Mort. Ins. Co.,
120 Ore. 1, 120 P2d 753 21

Carroll vs. Hartford Fire Insurance Co.,
28 Ida. 466, 478, 154 Pac. 984, 985, 988 30, 35, 51, 52

Charlton vs. Wakimoto,
70 Ida. 276, 216, P2d 370 44-48

Citizens State Bank vs. State Mut. Rodded Fire Ins. Co.,
276 Mich. 62, 267 N.W. 785 21

Collard vs. Universal Automobile Ins. Co.,
55 Ida. 560, 571, 45 P2d 288 53-59

Commercial Securities vs. Hall,
140 Ore. 644, 15 P2d 483, 486 18, 50

Commonwealth Casualty Co. vs. Arrigo,
160 Md. 595, 154 Atl. 136 44

Delanty vs. Yang Tsze Ins. Assoc.,
127 Wash. 238, 220 Pac. 754 21

Dissault vs. Evans,
74 Ida. 295, 261 P2d 822, 134 ALR 652 30, 41, 58

Farley vs. Western Insurance Co.,
62 Ore. 41, 124 Pac. 199 50

Fire Ins. Association vs. Merchants & Miners Transportation Co., 66 Md. 339, 7 Atl. 905 23

First State Bank of Odano vs. Fidelity Union Fire Ins. Co., 116 Tex. 132, 287 S.W. 50, 51 29

Fullweiler vs. Traders and General Ins. Co.,
59 N.M. 366, 285 P2d 140 21, 44

German Insurance Company vs. Hyman,
34 Neb. 704, 52 N.W. 401 21

Giles vs. Citizen's Insurance Company,
32 Ga. App. 207, 122 S.E. 890 24, 35

Goodel vs. New England Mutual Fire Insurance Co.,
25 N. Hamp. 169 22

Grant Lumber Co. vs. North River Ins. Co. of N. Y.
(Dist. Idaho) 253 Fed. 83 60

Hahn vs. National Casualty Co.,
64 Ida. 684, 136 P2d 739 43

Harrison vs. Fortlage,
161 U.S. 57, 116 S.Ct 488, 40 L.ed. 616, 619 30

Hennessey vs. Automobile Owners Ins. Asso.,
282 S.W. 791, 793, (1926) Texas) 27, 28, 29

Hennessey v. Automobile Owners Ins. Asso.
273 S.W. 1024 27

Home Insurance Company vs. Peoria and P. U. Ry. Co.
78 Ill. App. 137 19

Hooper vs. Robinson,
98 U.S. 528, 25 L.ed. 219 ... 20

Johnson vs. Bennion,
70 Ida. 33, 211 P2d 148 ... 33, 42

Johnson vs. Hollerman,
30 Ida. 691, 167 Pac. 1030 ... 48

Key vs. Continental Insurance Company,
101 Mo. App. 344, 74 S.W. 162 ... 22

Kloppenburg vs. Mays,
60 Ida. 19, 88 P2d 513 ... 49

Kozlowski vs. Pavonia Fire Insurance Company,
116 N.J.L. 194, 183 Atl. 154 ... 22

LaForge vs. LeBlanc,
137 Me. 208, 18 A2d 138 ... 22

Liberty National Life Insurance Comapny vs. Weldon
(Alabama 1957) 100 So2d 696, 708 ... 56

Lott vs. Taylor,
60 Ida. 263, 90 P2d 975 ... 49

Lux vs. Lockridge,
65 Ida. 639 ... 41

Mabee vs. Continental Casualty Co.,
37 Ida. 667, 219 Pac. 598 ... 43

Marley et al vs. McFarland et al,
(Idaho Ct. Jan. 21, 1958, 8545) ... 42, 44

Maryland Cas. vs. Boise Street Car,
52 Ida. 133, 11 P2d 1090 ... 48

McDonald vs. North River Ins. Co.,
36 Ida. 638, 646, 213 Pac. 349, 351 ... 51, 60

Meier vs. Eureka Security Fire and Marine Ins. Co.,
Mo. 168 S.W.2d 127, 133-134 ... 39

Merrill vs. Federal Crop Ins. Co.,
67 Ida. 196, 174 P2d 834 ... 31

Mull vs. United States Fiderity and Guaranty Co.,
35 Ida. 393, 206 Pac. 1048 51

National Auto and Casualty vs. Alford,
(Texas 1954) 264 P2d 862 30

Nelson vs. Hoff,
70 Ida. 354, 218 P2d 345 48, 49

Norris vs. Alliance Ins. Co.,
99 N.J.L. 435, 123 Atl. 762 23

North British Mercantile Ins. Co., Ltd. vs. Sciandro,
256 Atl. 509, 54 S.W.2d 764, 27 ALR2d 1047 22

Northern Assurance Co. vs. Crandview Building Assn.,
183 U.S. 308, 22 S.Ct. 133, 46 L.ed. 213 21

Omaha Woodsmen Life Ins. Soc. vs. Krussman,
131 F2d 83 52

Phoenix Ins. Co. vs. Erie & W. Transportation Co.,
117 U.S. 312, 29 L.ed. 873 23

Providence Washington Ins. Co. vs. Pass,
12 S.E.2d 460 36

Rauert vs. Loyal Protective Ins.,
61 Ida. 677, 106 P2d 1015 48

Riggs vs. Commercial Men Ins. Co.,
125 N.Y. 7, 25 N.E. 1058 27

Sant vs. Continental Life Ins. Co.,
49 Ida. 691, 291 Pac. 1072 49

Savarese vs. Hartford Ins. Co.,
99 N.J.L. 435, 123 Atl. 763 23

Schaeffer vs. Anchor Mutual Fire Ins. Co.,
113 Iowa 652, 85 N.W. 985 20

Scott vs. Dixie Fire Insurance Company,
70 W. Va. 533, 74 S.E. 659 52

Scowcroft vs. Roselle,
77 Ida. 142, 289 P2d 621 43

Southern Idaho Conference Assn. of Seventh Day Adventists vs. Hartford Fire Ins. Co., 31 Ida. 130, 169 Pac. 616 ... 45

Sweeney and Smith Co. vs. St. Paul Ins. Co., 35 Ida. 303, 206 Pac. 178 ... 31

Texas Company vs. Peacock, 77 Ida. 408, 293 P2d 949 ... 42, 44

U. S. vs. Kerr, 136 F. Supp. 771 ... 31

Votaw vs. Farmers Automobile Inter-Ins. Exchange, (1938 Cal) 76 P2d 1174, 85 P2d 872, 874, 875 ... 37

Wainer vs. Milford Mutual Fire Ins. Co., 153 Mass. 335, 26 N.E. 877, 11 LRA 598 ... 27

Watson vs. Royal Indemnity Co., 56 F2d 409 ... 53

Weaver vs. Hartford Fire Insurance Company, 168 Kan. 80, 211 P2d 113 ... 37

Weitzel vs. Zukich, 73 Ida. 301, 251 P2d 542 ... 48

Welch vs. Northern Assurance Co., 223 Ill. App. 77, 83 ... 19, 20

Willys-Overland, Inc. vs. Holliday, 284 S.W. 973 ... 28

Wombule vs Dubuque Fire and Marine Ins. Co., 316 Mass. 142, 37 N.E.2d 263 ... 33

Wyman vs. Security Ins. Co., of California, 202 Calif. 743, 262 Pac. 329 ... 38

Young vs. Califronia Ins. Co. et al, 55 Ida. 682, 46 P2d 718 ... 31, 48, 51

TEXT BOOKS

Black's Law Directory, Third Edition, West Publishing Company 50

Cooley, Cases of Insurance, Second Edition 23

Cyclopedia of Insurance Law, Couch, Vol 1, pps. 756-757 17

Cyclopedia of Insurance Law, Couch, Vol. 1, pps. 796-797 18

Essentials of Insurance Law, Patterson, p. 386 P. 291 19

26 Corpus Juris, Fire Insurance, p. 24 (Sec. 4) 16

134 ALR 652 30

27 ALR2d 1047 22

STATUTES

Section 41-201 (14), Idaho Code 16, 34

Section 41-1403, Idaho Code 62

Section 49-401, Idaho Code 24

Section 49-401 (b), Idaho Code 25

Section 49-405, Idaho Code 32, 33, 35

Section 49-404, Idaho Code 24, 33

Section 49-421, Idaho Code 33

CONSTITUTION

Art. I, Sec. 10 (2) Constitution of the United States 55

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Brief of Appellant

STATEMENT OF PLEADINGS AND JURISDICTION

This action was commenced in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, by filing of Complaint on or about January 7, 1957, (R. 7-9) and Summons was issued in said cause being then state cause number 19826, and upon the appearance by defendant a petition for removal was duly filed (R. 3-5), and Order of Removal in said cause 19826 was duly signed by the District Judge of the District Court of the Fifth Judicial District, The Honorable Darwin D.

Brown, on February 4, 1957 (R. 10-11). Jurisdiction is based upon diversity of citizenship and the amount in controversy exceeding $3,000.00 exclusive of interest and costs (R. 7-9 and R. 11-14). After Removal appellant filed Amended Complaint (R. 11-15) with Amendment made thereto (R. 14-15, R. 47-48), and respondent filed answer thereto (R. 17-23). The Jurisdiction of the District Court is invoked pursuant to action removed under 28 USCA 1441 and this being a civil action over which said District Court had original jurisdiction pursuant to 28 USCA 1332. On February 17, 1958, the District Court made Findings of Fact and Conclusions of Law and duly filed the same (R. 38-43) and entered Judgment in favor of defendant and against plaintiff (R. 44), and on March 17, 1958, Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, was duly filed by plaintiff (R. 45) along with Bond for Costs on Appeal (R. 45-46).

The Jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under 28 USCA sections 1291 and 1294.

QUESTIONS PRESENTED

The following questions are raised by appeal from the Judgment entered by the Honorable District Court:

I.

Could the District Court have held that appellant was not a bona fide purchaser for value?

II.

Should the Trial Court have concluded that in the state of Idaho a certificate of title is a condition precedent to the acquiring of an insurable interest in a trailer home.

III.

Should the Trial Court have concluded as a matter of law from the purported sale of the trailer house from Joseph Roberts and Albert Pauls to the appellant on May 17, 1956, that the appellant gained no right, title or interest in and to said trailer house by reason of said sale?

IV.

Should the Trial Court have concluded as a matter of law from the evidence presented including the contract of insured, that the appellant by the transfer of $2,000.00, received no insurable interest in said trailer house, and thus at the date of delivery to her of the insurance policy, had no insurable interest in said trailer house, and at the time of the damage of said trailer house by fire on September 23, 1956, the appellant had no insurable interest in the trailer house?

V.

Was the Trial Cout in error in entering judgment for the appellee and should not have judgment been entered

in favor of the appellant and against the appellee?

VI.

Could the court have entered and made findings of fact IV, V, VI, VIII, IX, X, XI, or any of them, under the evidence, and were the conclusions of law, all or any of them, justified under the evidence as the same was introduced?

VII.

Were any of the title questions as between Beatrice Nelson, the plaintiff to this lawsuit, and Supreme Trailer Company and Southwest Mobile Homes Sales Corporation relevant in an action on a contract of insurance policy as between Beatrice Nelson and New Hampshire Fire Insurance Company, the Appellee?

VIII.

Should the Trial Court have held under the facts as the same were introduced that under Idaho law appellant failed to prove grounds for relief, or that under Idaho law the facts show any valid defense to the claim of appellant or which defense appellee is entitled to assert.

STATEMENT OF FACTS

May 17, 1956, Beatrice Nelson of American Falls, Idaho, purchased a large 2 axle 4 wheel (Exhibit 16) 1956 Supreme

Trailer Home number 6955 (Exhibit No. 4, R. 55-59) for her own use and benefit and as and for a home (R. 61 and 65). Beatrice Nelson paid $2,000.00 for the 1956 Supreme Trailer Home (Exhibit No. 5, R. 57-58). Mrs. Nelson had been looking at trailer homes with the idea of purchase (R. 65). In American Falls, Idaho, her friends knew of her desire to purchase a trailer home. (R. 56). On May 17, 1956, two men with a trailer home for sale, Joseph Roberts and Albert Pauls, had a meal at a restaurant owned by Dan H. Bates and Dan H. Bates thereafter introduced these two men to Beatrice Nelson (R. 83-84). These two men offered to sell the trailer home because it had been damaged and allegedly would be rejected when delivered (R-70). Bates in turn informed Beatrice Nelson of the trailer home which seemed a good buy at $2,000.00 (R-56).

Beatrice Nelson recorded as a matter of public record the Bill of Sale which Bill of Sale shows thereon the consideration of two thousand dollars (Exhibit 4).

Thereafter during June, 1956, H. Dean Peterson, an agent of New Hampshire Fire Insurance Company (R. 23 admission, R. 25 Response) called on Beatrice Nelson in response from her inquiry to Bryan & Co., about insurance (R-59). The agent attempted to maximize the coverage and Mrs. Nelson informed him his estimates of value were over the actual purchase price (R-103-104, R-60). Beatrice Nelson agreed to buy $5,000.00 coverage and New Hampshire Fire Insurance Company agreed to sell this coverage. (R-61, R-104). On June 12 1956, New Hampshire Fire

Insurance Company issued to Beatrice Nelson a policy on the 1956 Supreme Trailer House insuring against loss by fire in an amount up to $5,000.00, (Answer R-19) and the policy being A-23-80-27 (R. 27, 28, 53, 55, Exhibit 3), Beatrice Nelson paid the premium on said policy for all times relevent (R. 27-28, 61), and on September 23, 1956, there was in effect said policy number A-23-80-27.

The policy was prepared by the insurer and on the first page of policy stating "Actual Cost When Purchased Including Equipment" was filled in by the agent of insurer and the figure used did not come from Beatrice Nelson (R-104).

Beatrice Nelson waited for the sewer line connection and then lived in the trailer house during the period of six weeks up to September 23, 1956 (R-61 and R-65).

In its answer the New Hampshire Fire Insurance Company admits: On June 12, 1956, the retail value of said trailer home to be at least $5,895.00 (R-20). The following statement was admitted.

> 15. "Do you admit the trailer house on which you issued Policy No. A 23-80-27 was damaged by fire during September 1956, and prior to September 24, 1956? (R-24).

On September 23, 1956, the trailer home was damaged by fire, (R. 61), the following Stipulation was made:

The Court: I don't know how much evidence you have as to the damages here, Mr. Johnson, is it not possible for (44) counsel to agree that if the Plaintiff is entitled to recover that the damage to the trailer would be a certain amount of money or the difference in value?

Mr. Martin: I think we could, your Honor.
(Off the record discussion by counsel.))

The Reporter: May I have the stipulation, please?

Mr. Johnson: The Stipulation being: It is stipulated by and between counsel that the value of the Supreme Trailer Home, number 6955, being the subject trailer home of this litigation, had a value immediately preceding the fire on September 23, 1956, of $5,895.00 and immediately after the fire which occurred September 23, 1956 the trailer had a value—a full fair market value of $1,267.50, upon such September 23, 1956: Is it so stipulated, counsel?

Mr. Martin: It may be so stipulated. (R-82).

On behalf of respondent insurer (R. 97) H. Dean Peterson and Stanley Smith investigated the fire and damaged trailer home a tthe site on the date of the fire September 23, 1956 (R. 95). On October 18, 1956, Stanley Smith, determined the subject trailer home was reported stolen (R. 96 and 92).

Insurer months after the September 23, 1956 fire, by

endorsement to the same policy A 23-80-27, insured a new trailer, that is, changed the item from the 1956 Supreme Trailer Home to a 1956 Angelus Trailer Home (Exhibit 14, R. 106-109).

Beatrice Nelson after the fire informed of a possible title question immediately secured an Idaho Title Certificate (R-77). No suit has been or was filed against Beatrice Nelson by Supreme Trailer Company the manufacturer of the trailer, or Southwest Mobile Homes Sales Company the selling agent of the manufacturer of the trailer, or Great American Indemnity Company the bonding agent of the preceding two companies and to whom a certificate of origin was allegedly issued by the preceding two companies (R 124-125, R. 150 and R. 145). After the fire Beatrice Nelson sold the subject trailer house (R. 150).

Beatrice Nelson, after seeing her attorney (R-56), having received a Bill of Sale, Invoice and Inspection sheet (R-58) and noted Roberts was an agent of Supreme Trailer Sales by him wiring it and receiving sixty dollars from it (R-142) paid for (R. 57-58) and took possession of the trailer home (R. 56). After filing suit Beatrice Nelson learned that the employee of Supreme Trailer Sales Joseph Roberts and his companion Albert Pauls apparently absconded with the $2,000.00 (Answer to Interrogatories of M. H. Rodgers R. 33) and with the $60.00 wired Joseph Roberts in American Falls, Idaho by Supreme Trailer Sales (R. 142-143). Joseph Roberts was employed by Supreme Trailer Sales to deliver the Supreme Trailer home from Bon-

ham, Texas to Boise, Idaho (R. 136-137). It is the procedure of Supreme Trailer Sales to collect on delivery (R. 117, R. 76), the driver being required to so collect (R. 118).

On the invoice it states "In the event of payment by check other than a cashier's check or a certified check, it is expressly understood that title shall remain in the seller until said check is honored." (Exhibit 6, R. 132)). Because of this Beatrice Nelson made out a personal check to the employee of Supreme Trailer Sales Joseph Roberts (Exhibit 5 R. 57-58), and the employee of Supreme Trailer Sales took the check to a local bank and cashed it so he could be assured the check would be honored (R. 56). It was honored and Beatrice Nelson was given her Bill of Sale.

Beatrice Nelson in due course submitted a proof of loss to the insurer and demanded $4,627.50 from the insurer, being the difference in the values immediately prior to and immediately after the covered damage and within the $5,-000.00 policy damage limits (Exhibit 1 and Exhibit 2, R. 52, 53). Insurer denied Beatrice Nelson her monies without any reason being given her for so doing, and February 1, 1957, suit was filed for $4,627.50 and attorney fees (R. 7-9) in the appropriate state court. Februray 4, 1957, the cause was removed to the Federal District Court by defendant.

No proper tender back to Beatrice Nelson of her premium was made by insurer.

Trial was had and Judgement was entered for defend-

ant. Plaintiff contending the trial judge erred in entering judgment for defendant, and in findings of fact, and conclusions of law appeals to this court.

SPECIFICATION OF ERRORS

I.

That the Trial Court erred:

(a) In finding of fact IV in the last clause thereof "not affecting the value thereof" as there is nothing in the record supporting such finding.

(b) In finding of fact V as to the finding that appellant was "fully conversant" with the prices and values of trailer houses.

(c) In finding of fact VI in holding and finding that "the plaintiff knew or by the exercise of any degree of care or caution should have known that neither the said Roberts nor the said Pauls had any right, title or interest in or to said trailer house or any right to sell or dispose of the same and that the plaintiff herein was not an innocent purchaser of said trailer house or a purchaser for value" for the reasons that the evidence does not support said findings and the evidence is uncontradicted that appellant was a purchaser without knowledge of any encumbrance or title defect and that appellant paid $2,000.00 consideration for the trailer house therefore being unequivocally an innocent purchaser for value under the laws of the State of Idaho.

(d) That the Court erred in finding of fact VIII to the effect that there was no disclosure to appellee by the appellant of the facts of the purchase of the trailer house for the reason that there is no evidence of any refusal by appellant to answer any inquiry of appellee or it agents concerning said facts of purchase or any other facts.

(e) In finding of fact IX in holding and finding "that at the time the plaintiff applied for and procured said policy of insurance, she had no insurable interest in said trailer house" as the evidence is to the contrary.

(f) In finding of fact X in holding and finding the appellee timely tendered back to the appellant the premium she paid for the insurance policy as the evidence is to the contrary.

(g) In finding of fact XI in holding and finding "that the plaintiff had no insurable interest in said trailer house at the time of the occurrence of the fire and has no claim whatsoever upon or against the defendant by reason of said insurance policy" as the evidence is to the contrary.

II.

That the Trial Court erred:

(a) In Conclusion of Law number I, for the reason that Joseph Roberts had apparent authority to pass title and in any event appellant by said purchase acquired an insurable interest in and to said trailer house.

(b) In Conclusions of Law number II and number III, for the reasons that appellant at the relevant dates having actual possession, bill of sale and other incidents of ownership had therefore an insurable interest in such trailer house.

The Court further erred in Conclusion of Law IV, V and VI for the reason that the Trial Court misconceived and misapplied Idaho law.

III.

The Trial Court erred in holding and finding relevant, in determining the contractual rights and duties between an insured and an insurer, the title questions between insured and third parties concerning subject trailer home in possession of insured both at the time of issuance of policy and the date of loss, and otherwise failing to recognize the difference between a title contest over personal property and a contractual claim based on an insurance policy.

IV.

That the evidence is wholly insufficient to support any affirmative defenses of appellee and thus to support the judgment entered, and under the rule of law of Idaho appellee failed to void the insurance contract sued upon.

V.

That the evidence discloses without contradiction the

appellant entitled to recover $4,627.50 under the terms of the contract of insurance, and reasonable attorney fees for prosecution of this action.

VI.

That the judgment entered is against the law for the reasons set forth herein and is unconstitutional and abridges the freedom and rights of the parties to contract.

VII.

That the cause having been determined and governed by the rules of law of the State of Idaho, it was the duty of the Court to follow such rules of law, and said rules of law of Idaho provide by definition that an insurable interest is any interest in property or in relation thereto or liability in respect thereof and that the insured need not prove existence of insurable interest and the burden to show lack of insurable interest, if any, is upon the insurer, and in this cause there is no evidence showing the appellant did not have an insurable interest.

VIII.

That the trial court erred in entering judgment in favor of the appellee and against the appellant.

ARGUMENT

The appellee is in this brief referred to by either term "respondent" or "appellee."

Counsel for appellee conceded and the Honorable

District Judge noted there is no question in this cause involving moral turpitude or a moral risk (R. 96).

It is the position of the appellant that the appellant without contradiction or doubt proved her cause to recover her loss from fire from insurer, and having so done no defense to such recovery by appellant was either properly raised in the pleadings or proven by appellee, and that the only apparent defense allowed to her claim would be fraud, which is without sufficient evidentiary support under the Idaho law, and appellee undoubtedly failed to show appellant did not have an interest that was insurable. In other words appellant having fully proven her cause, the facts do not support a prima facie defense for appellee. The cause having been determined and governed by rules of law of the State of Idaho it was the duty of the Court to follow such rules of law, and the rules of law of Idaho provide that an insurable interest is any interest in property or in relation thereto or liability in respect thereof, and that appellant insured need not prove existence of insurable interest and the burden to show lack of insurable interest, if any, is upon an insurer. In this cause there is no evidence showing the plaintiff did not have an insurable interest. Further, the rules of law of Idaho provide that a title certificate is not a condition necessary to acquiring an interest in or actual ownership of a motor vehicle and certainly not of a trailer home. Further, such rules of law of Idaho provide that insurance coverage is to be liberally applied to protect the insured. Further, the appellant contends that the respondent insurance carrier waived or is estopped to assert any affirmative de-

fence or defenses to payment of the risk insured against as there was neither compliance with policy terms in voiding the policy nor was there proper tender back of premium to appellant. It is the position of appellant that the trial court erred in holding and finding relevant in determining the contractual rights and duties between an insured and an insurer title questions between the insured and outside parties concerning the trailer home in this litigation which trailer home was in possession of insured under claim of title both at the time of issuance of the policy and the date of loss. In general the trial court erred in failing to recognize the difference between a title contest over personal property and a contractual claim based on an insurance policy. The judgment for defendant as well as findings supporting the judgment resulted from a misconception and misapplication of the Idaho law.

The essential question in this litigation is whether or not the appellant had an insurable niterest in the trailer house damaged by fire. The authorities are abundant in holding that *any interest* of an insured, with the singular safeguard that gambling contracts are to be avoided, is an insurable interest. The Idaho Code on the point is explicit;

> " 'Insurable interest', (property), shall mean every interest in property, or in relation thereto, or libility in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest. An interest in property insured must exist when the insurance takes effect, and

when loss occurs, but need not exist in the meantime."

Section 41-201 (14), Idaho Code.

The text books set this out, and we find this statement:

"Applying the rules just stated as to what constitutes an insurable interest it has been held that the following persons among others have an insurable interest in property; . . .; one in possession and use of property under a claim of right, although his title be defective or invalid."

26 C. J., Fire Insurance, page 24, Section 4.

Perhaps one of the most lucid and excellent statements on this is to be found in the work of Couch:

"As to property, it may be said that an insurable interest is any right, benefit, or advantage arising thereout or dependent thereon, or any liability in respect thereof, or any relation or concern therein, of such a nature that it might be so affected by the contemplated peril as directly to damnify the insured. In fact, any person has an insurable interest in property that derives a pecuniary benefit from its existence, or would suffer loss from its destruction, and this, whether he has, or has not, any title in, or lien upon, or possession of, the property itself. Any interest in property, legal or equitable, qualified or

absolute, will as a general rule support a contract of insurance thereon, since if such relation exists between the insured and the property that injury to it will, in natural consequence, result in loss to him, he has an insurable interest, as has the holder of an interest in property by the loss of which he is deprived of his possession, enjoyment, or profit, or security or lien resting thereon, or other certain benefits growing out of or dependent upon it. If there be a right of interest in property which some Court will enforce, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, where the loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest."

Cyclopedia of Insurance Law, Couch, Vol. I, pps. 756-757.

And this work further says:

"So, a title gives an insurable interest where, though not in fee, it is such that the owner would suffer a present, as distinguished from a mere expectment or prospective, loss or damage by the destruction thereof. So, the owner of the record title to property has an insurable interest therein, as has also the owner of the equitable title. In fact, an equitable interest in property is an insurable interest, and may be insured as such or it may be insured under the general

name of property. So, parties, have an insurable interest where, at the time insurance is made for them against loss by fire, they are entitled to one-third of the property by deed, and to two-thirds as mortgagee; although part is held under an agreement which has not been complied with, and which purports on its face to be void if not complied with, but which has not been declared void . . . And while any legal or equitable interest is sufficient, yet an insurable interest may exist without either, it being sufficient for instance, that the insured is so situated with reference to the property that he would be liable to loss should it be injured or destroyed by the peril insured against."

Cyclopedia of Insurance Law, Couch, Vol. I, pps. 796-797.

Such standard accepted definition or rule is well set forth in the case of Commercial Securities vs. Hall, 140 Ore. 644, 15 P2d 483, 486:

"In arriving at the meaning of an 'insurable interest,' the following excerpt from 4 Words and Phrases, Third Series, p. 346, will be helpful: 'Any person has an insurable interest in property if he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself.'

"As to what constitutes an insurable interest gener-

ally, we direct attention to the following from Cyclopedia of Automobile Law, Huddy (9th Ed.) 13, 14, P. 57: 'Whosoever may fairly be said to have a reasonable expectation of deriving a pecuniary advantage from the preservation of the subject matter of insurance whether that advantage inures to him personally or as the representative of the rights or interests of another, has insurable interest'."

* * *

"Still another pertinent observation is found in Richards on the Law of Insurance (4th Ed.) at S. 25, where the author says: 'It may be stated genarally that any legal or equitable estate, or any right which may be prejudicially affected, or *any liability which may be brought into operation, by fire,* will confer an insurable interest . . . A defeasible interest is insurable, as also is a contingent, or inchoate or partial interest'." (our italics).

See also: Home Insurance Company vs. Peoria and P. U. Ry. Co., 78 Ill. App. 137.

Welch vs. Northern Assurance Co., 223 Ill. App. 77, 83;

Allen vs. Phoenix Assoc., 12 Ida. 652, 88 Pac. 245;

Essentials of Insurance Law, Patterson, P. 291;

Hooper vs. Robinson, 98 U. S. 528, 25 L. Ed. 219;

Schaeffer vs. Anchor Mut. Fire Ins. Co., 113 Iowa 652, 85 N. W. 985.

"The authorities all agree that it is not necessary that the insured should have an absolute right of property, and that he has an insurable interest if, by the destruction of the property, he will suffer a loss, whether he has, or has not a title to, lien upon, or possession of the property itself."

Banner Laundry Co. vs. Great Eastern Casualty Co., 148 Minn. 29, 180 N. W. 997.

"A person who has no title in the property and has neither possession nor right of possession has an insurable interest therein, provided he will suffer pecuniary loss in case of the damages or destruction of the premises by fire. Home Insurance Company of New York vs. Mendenhall, 164 Ill. 458. This rule has been sustained by the authorities in all jurisdictions so far as we have been advised."

Welch vs. Northern Assurance Co., 223 Ill. App. 77, 83.

Although bare title, Bill of Sale or a Deed is suffciient, even without bare title, an interest to be insurable does not

depend upon the ownership of the property. Contingency interest or bailment or trust impressed by law or otherwise is enough. If by the loss the holder of the property be deprived of the possession, enjoyment, or other benefits growing out of or depending upon the existence of the property, he has an insurable interest.

Delanty vs. Yang Tsze Insurance Assoc., 127 Wash. 238, 220 Pac. 754;

German Insurance Co. vs. Hyman, 34 Neb. 704, 52 N. W. 401;

Bird vs. Central Manufacturers Mort. Ins. Co., 120 Or 1,120 P2d 753;

Citizens State Bank vs. State Mut. Rodded Fire Insurance, 276 Mich. 62, 267 N. W. 785;

Fullweiler vs. Traders and General Insurance Company, 59 N. Mex. 366, 285 P2d 140;

Northern Assurance Co., vs. Grandview Building Assn., 183 U. S. 308, 22 S. Ct. 133, 46 L. ed. 213.

"Interest" does not necessarily imply a right to a whole or part of the thing, nor necessarily or exclusively that which may be the subject of privation, but having some relation to or concern in the subject of insurance, which relation or concern, by the happening of the perils insured against, may

be so affected as to produce a damage, detriment, or prejudice to the party insuring. To be interested in the safety of a thing is to be so circumstanced in respect to it as to have benefit from its existence, prejudice from its destruction.

Key vs. Farmers Insurance Company, 101 Mo. App. 344, 74 S. W. 162;

North Brtiish Mercantile Insurance Co., Ltd. vs. Sciandro, 256 Ala. 509, 54 S.W. 2d 674, 27 A. L. R. 2d 1047;

LaForge vs. LeBlanc, 137 Me. 208, 18 A2d 138.

Any qualified interest in a thing insured may be legally protected by insurance.

Baird vs. Fidelity-Phenix Fire Insurance Company, 178 Tenn. 653, 162 S. W. 2d 384;

Goodel vs. New England Mutual Fire Insurance Co., 25 N. Ham. 169;

Kozlowski vs. Pavonia Fire Insurance Co., 116 N. J. L. 194, 183 Atl. 154.

It has been repeatedly held that a person having the mere right of possession of property may insure it to its full value and in his name, even when he is not responsible for its safe keeping.

Fire Ins. Assocaition vs. Merchants & Miners Transportation Co., 66 Md. 339, 7 Atl. 905;

Phoenix Ins. Co. vs. Erie & W. Transportation Co., 117 U. S. 312, 29 L. ed. 873.

Thus a bailee may recover in such circumstances under a policy insuring goods gratuitously kept in storage for another. Inasmuch as one having actual possession of a chattel, although once acquired by theft or otherwise wrongfully, has a possessory right good as against all the world except the true owner or one having a prior right of possession, and there is no reason why this qualified possessory right should not give him an insurable interest. So where an insured purchases an automobile from a thief, the better view recognizes his insurable interest therein.

Norris vs. Alliance Ins. Co., 99 N. J. L. 435, 123 Atl. 762;

Savarese vs. Hartford Ins. Co., 99 N. J. L. 435, 123 Atl. 763;

Cooley, Cases of Insurance 2d Edition.

Barnett vs. London Assur. Corp., 138 Wash. 673, 245 Pac. 3.

Therefore, "insurable interest" both by Idaho statute and at common law means *every* or *any* "interest" in pro-

perty or in relation thereto or liability in respect thereof.

The appellee asserts the problem in this law suit of whether or not a title certificate is a condition precedent to the acquiring of an insurable interest.

Of course, the burden to show lack of insurable interest is always on the insurer, there is no exception.

> Allen vs. Phoenix Assoc. Co. 12 Ida. 652, 88 Pac. 245;
>
> Giles vs. Citizens Insurance Co., 32 Ga. app. 207, 122 S.E. 890.

Although it would seem in Idaho that a person might obtain a certificate of title on a motor vahicle, and that the securing of such might under certain circumstances invoke estoppel as between adverse title claimants under section 49-404, Idaho Code; yet it would seem plausible upon reading section 49-401, Idaho Code, that a trailer home whose unladen weight is more than 2,000 pounds is not defnied as a motor vehicle. In other words, in Idaho a certificate of title is not involved in any way with personal property defined as house trailer or trailer home whose unladen weight is more than two thousand pounds.

The appropriate section of the Idaho Code defining motor vehicles for purposes as used in Title 49, Chapter 4, Idaho Code, governing certificates of title is as follows:

"Definitions.—the following words and phrases when used in this Chapter shall, for the purposes of this Chapter, have the meanings ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

"B. 'Motor Vehicle' Every vehicle, as herein defined which is self-propelled and every vehicle designated to be drawn upon a public highway behind and in conjunction with a self-propelled motor vehicle, provided there shall be excluded herefrom every such vehicle so drawn, excepting house trailers, whose unladen weight is less than 2,000 lbs."

Section 49-401 (b), Idaho Code.

It might be noted that the predecessor definition which was in effect in Idaho until March 2, 1955, provided as follows:

"B. 'Motor Vehicle' Every vehicle, as herein defined which is self-propelled."

The Idaho legislature did not add to the prior law the words "and house trailers" then follow by a third category of inclusion, but apparently included only house trailers of less than 2,000 lbs.

The above statute is certainly incapable of clear meaning and is at the very least ambiguous, and therefore the

cases which involve automobiles and certificate of title are not clearly relevant to the cause before the court. This is true for the reason that the record contains no proof that the trailer home which was transferred to the appellant-insured, Beatrice Nelson required a certificate of title under Idaho law.

The appellant herein in its policy of insurance involved in this litigation, has under paragraph 10 of the Conditions of the policy A-23-80-27 specifically distinguised between a "motor vehicle" and trailer or semi trailer. The insurer considered the words motor vehicle, trailer and semi trailer to be mutually exclusive one from the other, and specifically provided that the word trailer under the policy would include semi trailer, but that "motor vehicle" to be in no way construed as meaning or embodying trailer or semi trailer (Exhibit 3).

However, even though a trailer home be a "motor vehicle" a certificate of title in Idaho is not a necessity to either ownership or an insurable interest in a motor vehicle.

As regards motor vehicles, there is a minority rule found in cases, but not followed consistently, in the States of Georgia, Iowa, Kansas, Missouri, Ohio and Texas and perhaps one other jurisdiction, and in some of these states the rule once adopted is being completely circumvented and in practice reversed, and in Texas the rule was short lived indeed. We submit such a rule has not been, and because of its absurdity, will not be adopted by forty-one states in this Re-

public. Rather the majority rule defining insurable interest taken from the reasoning of the Massachusetts and New York courts seems to be consistently applied, whether or not a motor vehicle be involved or not.

The leading case from which the majority rule springs appears to be Wainer vs. Milford Mutual Fire Insurance Co., 153 Mass. 335, 26 N. E. 877, 11 LRA 598, and see Riggs vs. Commercial Men Ins. Co., 125 N. Y. 7, 25 N. E. 1058.

Discussion on the point is found in the Texas cases, following the Massachusetts and New York rule, and are a dramatic example of how able judges can be led astray by the misapplication of statutes and circumlocution of logic on the point at issue:

Hennessey vs. Automobile Owners Ins., Assoc., 273 S. W. 1024, (wherein the Texas Court of Civil Appeals held that without complying with the theft protection statutes in Texas a sale was void and no title or interest whatever passed to the purchaser and therefore there was no insurable interest).

However, a year later the Commission of Appeals in Texas in the same Hennessey case reported in 282 S. W. 791, held exactly contrary, saying:

> "The purpose for which this act was passed is clearly expressed in the caption of the bill. It is to prevent the theft of motor vehicles. We may not presume that the purpose was other than that expressed. Its

purpose was not to prevent fraudulent sales and transfers . . . When the language used in this statute, the evil for which remedy was sought, and the effect of holding contracts void when entered into without complying with the requirements made, are all taken into consideration, we think it is manifest that the Legislature had no intention to declare void sales made where the acts required are not performed . . .

"Hennessey had an insurable interest in the property insured . . ."

Hennessey vs. Automobile Owners Ins. Assoc. (1926 Texas) 282 S.W. 791.

The next Texas case said:

"The statute is intended, merely, as a regulatory statute in respect to sales of motor vehicles, and as such cannot be held to invalidate sales."

Willys-Overland Inc. vs. Holliday, 284 S. W. 973.

We submit that the Texas logic in the decision 282 S. W. 791 shows a true understanding of distinguishing between a statute to prevent theft of motor vehicles and a private bilateral insurance contract executed by insured and left partly executory as to insurer upon the happening of a

certain contingency. In this case Mrs. Nelson very definitely suffered a loss (R. 82).

"The purpose for which this act was passed is clearly expressed in the caption of the bill. It is to prevent the theft of motor vehicles . . . Its purpose was not to prevent fraudulent sales and transfers. The theft of motor vehicles has no relation to sales and transfers, and can therefore furnish no ground for legal inference that it was the intention of the legislature to prevent such sales and thereby render unenforceable contracts in regard to property. This it seems to us is clear."

Hennessey vs. Automobile Owners Ins. Assoc., (1926 Texas) 282 S. W. 791, 793, reversing 273 S. W. 1024

See also in the same volume:

American Lloyds vs. Gengo, 282 S. W. 957.

"The fact that the requirements of said statutes were not observed in the sale of the automobiles to said motor company will not defeat a recovery on the insurance policy sued on."

First State Bank of Odano vs. Fidelity Union Fire Insurance Company, 116 Tex. 132, 287 S. W. 50, 51.

Also see: National Auto and Casualty vs. Alford, (Texas 1954) 265 S.W. 2d 862.

The Idaho Statute is regulatory and not mandatory or even prohibitory as regards transactions between parties.

> Dissault vs. Evans, 74 Ida. 295, 261 P2d 822 134 ALR 652.

Undoubtedly the majority rule, and possibly the unanimous rule by which it is to be determined whether the insured had an insurable interest in the destroyed property is that stated by the decision in 1896 of the U. S. Supreme Court in Harrison vs. Fortlage, 161 U. S. 57 116 S. Ct. 488, 490, 40 L. ed. 616, 619, as follows:

> "It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title, or lien upon, or possession of the property."

Idaho has, plainly so held by implication.

The certificate of title issue inserted by defendant to this lawsuit is immaterial and irrelevant regarding the question touching insurable interest in Idaho.

> Alliance Insurance Co. vs. Enders, 293 Fed. 485;
>
> Carroll vs. Hartford Fire Insurance Co., 28 Ida. 466, 478, 154 Pac. 985, 988;

Merrill vs. Federal Crop Insurance Co., 67 Ida. 196, 174 P2d 834;

Sweeney and Smith Co. vs. St. Paul Insurance Co., 35 Ida. 303, 206 Pac. 178;

Young vs. California Insurance Co. et al, 55 Ida. 682, 46 P2d 718.

U. S. vs. Ken, 136 F. Supp. 771.

The Bill of Sale was recorded by appellant affording constructive notice of record and plainly stated thereon the consideration paid for the trailer home by appellant and also who signed the Bill of Sale (R. 57 and Exhibit 4). The trailer home was in open, notorious and plain view to all and lived in by appellant (R. 65).

The case of Allen vs. Phoenix Insurance Co., 12 Ida. 652, 88 Pac. 245, should put at rest any doubt as to the Idaho requirements of a prima facie case by insured. Further, this same case although not directly in point is the guidepost of Idaho law governing the defenses raised by respondent. Such attempted defenses simply were not proven by appellant under the Idaho laws. The Allen case says:

> "As stated in the original opinion, if the title disclosed was held to be short of the requirements contained in the policy, still it would not defeat the right to recover under the policy, if it could be shown that the insured, in their application, truly represented the

> state and condition of the title of the property. In such casce, the insurer could not insert a contrary provision in the policy with knowledge of the true condition of the title, and thereby bind insured and defeat his right of recovery in case of loss, and after having received the premium."

Not only were all details surrounding the purchase of the trailer home by Beatrice Nelson a matter of public record (Exhibit 4), or plainly observable to H. Dean Peterson, but the only mis-statement appearing in the record was that made by the appellee through its agent when the agent supplied the actual cost when purchased including equipment of Five thousand ($5,000.00) Dollars (R. 104), in the policy, and there is no doubt but that the agent did not get this information from the insured but supplied it himself (R. 104). There is further the maybe salient but very obvious fact in the record that the insured did not mis-state any facts whatsoever to the insurer! In fact, this is not contended in the pleadings or otherwise by the respondent. The salient albeit not material facts should be noted that Supreme Trailer Sales according to the testimony of its officers transferred the possession for purposes of sale of the trailer home to Southwest Mobile Homes Sales Corporation and that Southwest Mobile Homes Sales Corporation brought the trailer into the state of Idaho, and that the Idaho law (Section 49-405, I. C.) provides "In all cases of transfer of motor vehicles the application for Certificates of Title shall be flied within seven days after the delivery of such motor vehicles,

provided, dealers need not apply for Certificate of Title for such motor vahicles in stock and *when such are acquired for stock purposes.*" (Our italics).

The record indicates that the property was thus transferred between these companies without transfer of the title certificate or attempt to transfer title certificate.

See: Section 49-405, Idaho Code, section 49-421, Idaho Code and section 49-404, Idaho Code.

In Idaho it is not necessary to apply for a Certificate of Title for seven days after possession and the application of the minority rule if applied in Idaho would result in complete havoc, as few, if any purchasers would have their title certificate at the time that they insure their vehicle and would under such minority rule than not have an insurable interest at the time the policy was issued resulting from such application, as in the instant cause, a windfall profit for the insurer.

Wombule vs. Dubuque Fire & Marine Ins. Co., 316 Mass. 142, 37 N.E. 2d 263.

A purchaser has seven days in which to apply. This rule is regulatory or directory, not mandatory.

Johnson vs. Bennion, 70 Ida. 33, 211 P2d 148.

As previously noted, the statutes of Idaho also provide (section 49-405, Idaho Code) that in cases of transfer, the

application for certificates of title shall be filled *within seven days* after the delivery of such motor vehicles. If one follows the trial court's decision to a logical conclusion, it simply adds to the morality problem. It will give unnecessary, unjust and unexpected additional windfalls to the insurance companies, all, of course, in violation of their contractual obligations, and this to the detriment of the innocent policy purchaser. To cite a pertinent example, let us say that a purchaser of an automobile from a dealer immediately upon purchasing the same secured insurance protection and was told by the company that he had insurance coverage on the same. However, the certificate of title was then later applied for, as in most cases it is, after the insurance policy is taken but within the seven days period. A loss thereafter occurs. In such instance, of course, the insurance company would have, under the District Court's decision, plain right to assert that there was no insurable interest as a certificate of title was not issued at the time the policy was issued. (Sec. 41-201 (14), Idaho Code "An interest in property insured must exist *when the insurance takes effect . . .*" (our italics). Appellee and the trial court hold one has no interest in a motor vehicle without having obtained a certificate of title. Surely this overlooks the commerce of the day, the business of the world, and reflects upon the very morals of our society. Justice being an equal thing, applied impartially, it is difficult to see how in all fairness such a conclusion could be adopted by this circuit. However, this is the sure result obtained from extending the logic of the District Court decision to its ultimate end. It is only a

matter of degree as to the amount of neglect. One may waste two weeks, three months or six months before applying for a title. But this neglect in all legal or moral considerations should not affect insurable interest.

Beatrice Nelson properly acquired her title certificate under Section 49-405, Idaho Code, which provides:

> "If a certificate of title has not previously been issued for such motor vehicle in this State, said application, unless otherwise provide for in this chapter, shall be accompanied by proper Bill of Sale or duly certified copy thereof, or . . ."

It should be pointed out that for a time the cases suffered from a misconception and confusion by the Courts of the sole ownership provision which was in the former New York Standard form with the insurable interest requirement. It might be noted that in the policy now before the Court the sole ownership provision is *not* in the policy. Under Idaho law it would make no difference if it were as sole ownership is not required in spite of such provision.

> Carroll vs. Hartford Fire Ins. Co., 28 Ida. 466, 154 Pac. 985.

In one of the minority states, Georgia, the original misconception and confusion of sole ownership provision with insurable interest expressed by obitur dictum in Giles vs. Citizen's Insurance Co., 32 Ga. App. 207, 122 S. E. 890 has been later clarified on this distinction.

Alliance Insurance Co. vs. Williamson, 36 Ga. App., 137 S.E. 277.

"This court has held that the word 'interest', as applied to property, is broader than the word 'title'. It is practically synonymous with the word 'estate' . . . 'An estate is defined to be the quantity of interest which a person has, . . . from absolute ownership down to naked possession'."

Providence Washington Ins. Co. vs. Pass, 12 S E. 2d 460.

Also the confusion has been a great deal clarified by a statement of the Kansas Court, one of the minority states.

"For purposes of the Service Co. policy, taken out on December 28th, did insured have an insurable interest in the White truck and the tank on December 30th? He argues that he did not (and the lower court so found) for the reason that as of that date he had not yet received a bill of sale and a certificate of title. Sorenson vs. Pagenkopf, 151 Kan. 913, 101 P2d 928 (cases cited). We find no fault with those decissions, but they are not in point to the case at hand for the reason that they were either possessory actions or else the question of insurable interest was brought in issue by virtue of a failure to comply with the regulatory and penal provisions of the statute governing the sale and exchange of automobiles. Furthermore,

there is no claim that the insured violated any of the provisions of G.S. 1047 Supp. 8-135, so as to affect adversely his title to the White truck. *A person may actually own and operate an automobile and thus have an insurable interest in it and yet not have legal evidence of title.* Insurable interest has been defined as: 'The principle may be stated generally that anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction.' 29 Am. Jur. Insurance Sec. 322, P. 293 * * *

"Under all of the facts and circumstances, we have no difficulty in holding that for the purposes of the Service Co. policy issued on December 28, insured had an insurable interest in the White truck and tank."

Weaver vs. Hartford Fire Insurance Co. 168 Kan. 80, 211 P2d 113.

A full discussion of the problems here is contained in Votaw vs. Farmers Automobile Inter Insurance Exchange (1938 Cal.) 76 P2d 1174, 85 P2d 872, 874, 875:

"That is to say, that should the parties fail to comply with the statutory requirements, the 'title' to the automobile should be deemed 'not to have passed': nor shall the 'transfer' be deemed complete or valid for any purpose. It is apparent that one may have

'title' to a thing and not be its owner; likewise, would it be possible for one who holds the naked title, to 'transfer' the property to another without the ownership therein being at all affected. On the other hand, one who is the equitable owner of property may convey his rights therein without any effect being produced in the legal title thereof. *For example, had one purcased an article of personal property, but had had to deliver into the possession of another to whom a Bill of Sale or other evidence of ownership had been given, there would be no doubt that the one who had furnished the money for such purchase at least would be the equitable owner of such property.* It therefore would seen not impossible that the language of the statute to which attention had been directed may affect the legal title, as distinguished from equitable ownership of or interest in an automobile (cases cited)"

Also see Wyman vs. Security Ins. Co. of California, 202 Calif. 743, 262 Pac. 329.

In one of the minority jurisdictions the court said:

"Concerning the question of plaintiff's title to the semi-trailer, defendant asserts that there was no competent evidence thereof and that plaintiff, therefore, was not shown to have an insurable interest in the property, and the oral contract of insurance was void. It was not necessary for plaintiff to show absolutely

conclusive proof of ownership of the vehicle to be entitled to have his case submitted to the jury. It was sufficient for that purpose that a prima facie showing of ownership be made. Plaintiff clearly made such a showing of ownership. The title to the semi-trailer was not directly involved in this suit at all. It was only collaterally or incidentally involved. Esty vs. Walker, 222 Mo. App. 619, 3 S.W.2d 744; See also Carpenter vs. Gwendler Mac. Co., 162 Mo. App. 296, 141 S. W. 1147.

"We agree with the statement of the trial court in the memorandum filed in this overruling of defendant's motion for a new trial that, under the authority of Crawford vs. General Insurance Corp. Mo. App. 119, S. W. 2d 458 and Saffran vs. Shade Island Ins. Co. of Providence, R. I., Mo. App. 141 S. W. 2d 98, the demurrer to the evidence raising the question of sufficiency of plaintiff's title were properly overruled * * *"

Meier vs. Eureka (Mo.) 168 S. W. 2d 127, 133-134.

It is obvious that the statutory provision that "title" to an automobile shall not be demmed to have passed or "transfer" thereof be deemed complete until certificate of title is issued deals only with "title" and "transfer" and does not affect property right or right of ownership or interest in an automobile. The Idaho Court has adopted the rule in Al's

Auto Sales vs. Moskowitz, 203 Okla. 611, 224 P2d 588, 591, 592 and in such case the Oklahoma Court said:

> "It is contended by plaintiffs that the sale of the automobile in question was illegal and void for failure to comply with the provisions of the Motor Vehicle License and Registration Act, Title 47 O. S. A. Sec. 22 et seq., in that no certificate of title was delivered to defendant Cross Motor Company, or by said company to Moskowitz. This contention is untenable. The act does not expressly provide that sales made without complying with the requirements shall be void and a violation of said act does not invalidate the sale or prevent title from passing. McNeil vs. Larson, 171 Okla. 608. 43 P2d 397, following Parrot vs. Gulick, 145 Okla. 129, 292, P. 48.
>
> "Plaintiffs, under the facts in this case, cannot recover by reason of the certificate of title; such certificate of title to an automobile issued under a motor vehicle code is not a muniment of title which establishes ownership, but is merely intended to protect the public against theft and to facilitate recovery of stolen automobiles and otherwise aid the state in enforcement of its regulation of motor vehicles. Adkisson vs. Waitman, Okla. Sup., 213 P2d 465 and cases cited therein.
> "Where one of two innocent parties must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third

party to perpetrate the wrong or cause the loss. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, Text 121, 47 So. 942, 16 Ann. Cas. 1054."

The Idaho Court in modifying Lux vs. Lockridge, 65 Ida. 639, in Dissault v. Evans, 74 Ida. 295, 261, P2d 822;

". . . plaintiff is estopped from claiming title as against a bona fide purchaser for value, from the dealer without actual or constructive notice of the conditions on which the car was delivered to the dealer."

* * *

"Appellants argue a person cannot deal with another, thinking he is the principal and later attempt to bind the true principal under the apparent authority doctrine, citing 2 Am. Jur. 85, s 103. While the text so states, the appended note leads to the more pertinent subsequent statement:

'A distinguishable case, insofar as the third person relies upon the indicia of authority, is furnished in the situation in *which an agent has the possession of property* or *of a document representing the title to the same,* although the third person does not know of the principal, but deals with the agent as owner or as one having the right to dispose of the

property' p. 86. '. . . In other words, when an owner of property clothes another with *apparent title* or *power of disposition*, third persons induced to deal with him, will be protected. The fact that the possessor of such external indicia of power may abuse the confidence of his principal does not prevent a sale to a fair purchaser from divesting the principal of title' p. 96, Sec. 114.

"The latter quoted text is the controlling thought appropiate herein.

"In law, equity, good conscience, and even-handed justice, the judgment should be and is affirmed" (Italics Ours).

See also:

Johnson vs. Bennion, 70 Ida. 33, 211 P2d 148;

Marley et al vs. McFarland et al, (Idaho Ct., Jan. 21, 1958, 8545);

Texas Company vs. Peacock, 77 Ida. 408, 293 P2d 949.

The Idaho Cases are clear on this. In fact, they are so clear that, as the record discloses, the purchaser and insured Beatrice Nelson sold the property (R. 150) and no legal action was brought against the insured in this case by either the manufacturer, the selling agent of the manufacturer or

the surety for the manufacturer (R. 124-125, R. 150, 145). It might be noted that the manufacturer delivered possession to a corporation, which corporation allegedly had full "title" and "authority" to conclude a sale and take payment (R. 135) though no "certificate of title" of any kind was transferred or given to such selling corporation (Record). The agent Roberts of the selling corporation normally had authority to accept payment for the selling corporation (R. 117-118). The insured, Beatrice Nelson, obtained an Idaho title when it was necessary to make a sale of the trailer house and then assigned such title to the subsequent purchaser through her.

A principal in the state of Idaho is bound by the contracts of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding that they are in violation of private limitations upon his authority of which the person dealing with him, acting in good faith, has no knowledge. This same rule applies both to the actions of agents of respondent, New Hampshire Fire Insurance Company, and to Joseph Roberts, the agent of Supreme Trailer Sales and Southwest Mobile Homes Sales Company.

Scowcroft vs. Roselle, 77 Ida. 142, 289 P2d 621;

Hahn vs. National Casulty Co., 64 Ida. 684, 136 P2d 739;

Mabee vs. Continental Casulty Co., 37 Ida. 667, 219 Pac. 598;

Charlton vs. Wakimoto, 70 Ida. 276, 216 P2d 37;

Commonwealth Casulty Co. vs. Arrigo, 160 Md. 595, 154 Atl. 136;

Fullweiler vs. Trailer and General Ins. Co., 59 N.M. 266, 285 P2d 140;

Marley vs. McFarland et al (Idaho 1958) number 8545;

Texas Company vs. Peacock, 77 Ida. 408, 293 P2d 949.

Is it not obvious in the record that Roberts had apparent authority to sell the damaged trailer under the Idaho rules of law?

We submit to this Court in all earnestness that the Certificate of title argument showing or not showing an insurable interest is nothing more nor less than a device to secure a windfall to the insurers in such cases as this. Actually, the facts in the records now before this Court show without contradiction that the most that can be asserted is that Beatrice Nelson failed and neglected to secure a certificate of title which might or might not be required under Idaho law. In other words, Beatrice Nelson failed to meet one requirement affecting a transfer of title to which she did eventually conform. This failure under the construction and law contended for by the respondent would result in a forfeiture of a legal

right. Such a forfeiture is not only to be abhorred but we feel to be utterly condemned in a record like this. In Idaho in a case similar to the one before the Court, the same contention regarding proof of loss was made by Martin and Martin attorneys, on behalf of insurer.

> Southern Idaho Conference Association of Seventh Day Adventists vs. Hartford Fire Insurance Co., 31 Ida. 130, 169 Pac. 616.

The Idaho Supreme Court made short shrift of such a contention!!

It is impossible to prove a negative as to what is not in the record except by referring to the record as a whole. We do so refer in commenting on the following.

The findings of fact and conclusions of law asserted by respondent's theory to be relevant are in essence based on paragraph IV and paragraph V of the Answer of Respondent.

We quote such asserted portions of the answer.

> "Specifically answering paragraphs IV and V of said Amended Complaint, this answering defendant admits that on June 12, 1956, it issued its policy of insurance to the plaintiff herein insuring the plaintiff against loss by fire and lightning in an amount not to exceed $5,000.00 but, in this connection, this defendant alleges that it issued its said insurance policy

to plaintiff herein *upon the representation of the plaintiff that she was the sole and lawful owner of said trailer, all of which representation was false and untrue and known to the plaintiff to be false and untrue . . .*" (R. 19).

"*. . . that common, ordinary care and prudence would have dictated to any reasonable prudent person that said traler house was embezzled and stolen and that the said Albert Pauls and Joseph R. Roberts were not, could not, and did not transfer any valid title whatsoever to said trailer house . . .*" (R. 20).

We submit there is nothing in the record by inference or otherwise that one word in the above italicized portion are or were true!! The respondent itself through its agent H. Dean Peterson asserted most of these allegations to be untrue (R. 103-104). The evidence shows conclusively that Beatrice Nelson did not at any time make any mis-statement of fact regarding her interest in this trailer home to appellee or others!! Further, the evidence shows plainly and without contradiction appellant, Beatrice Nelson, did not know of the Roberts-Paul alleged activities until she found out *from* and *through* appellee and its agents!! (R. 145-146, R. 72-73).

Also in paragraph II of the so-called separate defense it is alleged that the Great American Indemnity Company made demand upon Beatrice Nelson and that Beatrice Nelson turned over the trailer home to Great American Indemnity Company. The facts were not so! The allegation was unproven and is false.

It is further submitted that finding of fact IV to the effect the damage to the trailer house "not affecting the value thereof", has no support whatsoever in the evidence adduced. Further, finding of fact VI that plaintiff was not a "purchaser for value" is not only not established by the evidence, but such finding is completely shown to be false by the uncontradictory evidence! (Exhibit 4, Exhibit 5). And, further, that plaintiff was not an innocent purchaser of said trailer house is not a valid finding of fact as there is no evidence whatsoever to support that plaintiff was not an innocent purchaser, and the uncontradictory evidence is that she was an innocent purchased. Further, how the Court from the evidence adduced found that Beatrice Nelson "was fully conversant" with the prices and values of trailer houses as stated in finding of fact V is not only a doubtful conclusion but has no competent evidence in its support. Of course, finding of fact VII is irrelevant to the issue.

In regard to finding of fact VIII it can be dogmatically stated that no information requested by respondent was withheld by appellant. And, further, in regard to finding of fact VIII the evidence conclusively establishes record notice of the material facts of the purchase of the trailer house being constructive notice to respondent and actual notice to respondent through H. Dean Peterson.

There is no support whatever for finding of fact IX. As regards finding of fact X the sum of $1,200.00 is inserted despite a specific stipulation on the amount in open Court (R. 82). There is no suport for finding of fact XI.

The Conclusions of Law spring from a misconception and misapplication of Idaho Law.

The Idaho law holds that in order to rescind on the basis of fraud or sustain fraud as a defense it is incumbent upon a party asserting fraud to plead and prove (1) the particular representations that were made: (2) that they were false and fraudulent and (3) material (4) and so known to be false by the party making them; that the party asserting fraud (5) believed and (6) relied on such statements; and (7) acted upon the belief and (8) with the understanding that such false and fraudulent representations were in fact true.

Young vs. California Ins. Co.,
55 Ida. 682, 46 P2d 718;

Charlton vs. Wakimoto,
70 Ida. 276, 216 P2d 370;

Johnson vs. Hollerman,
30 Ida. 691, 167 Pac. 1030;

Weitzel vs. Jukich,
73 Ida. 301, 251 P2d 542;

Nelson vs. Hoff, 70 Ida. 354, 218 P2d 345;

Maryland Casualty vs. Boise Street Car,
52 Ida. 133, 11 P2d 1090;

Rauert vs. Loyal Protective Ins.,
61 Ida. 677, 106 P2d 1015;

Sant vs. Continental Life Ins. Co.,
49 Ida. 691, 291 Pac. 1072.

A false representation which causes no loss is not actionable. There is no fraud without loss.

Kloppenburg vs. Mays, 60 Ida. 19, 88 P2d 513.

The Idaho law is: "Fraud will not be presumed and appellants had the burden of establishing all the elements of the fraud * * * by clear and convincing evidence."

Lott vs. Taylor, 60 Ida. 263, 90 P2d 975;

Nelson vs. Hoff,
70 Ida. 354, 218 P2d 345.

It is obvious to a certainty that respondent utterly and completely failed to prove fraud on the part of appellant. We shall not belabor something so obvious with unnecessary argument. FORFEIT means:

> "To lose an estate, a franchise, or other property belonging to one, by the act of the law, and as a consequence of some misfeasance, negligence, or omission . . .
>
> "To incur a penalty; to become liable to the payment of a sum of money, as the consequence of a certain act. To incur loss through some fault, omission, error, or offense; loss."

Black's Law Dictionary, Third Edition, West Publishing Company.

The Idaho Supreme Court has never allowed a forfeiture by insured of a valuable property right! When any interest (bare possession or less) has been shown the Idaho law has never declared a lack of insurable interest, and the cases are sparse indeed for lack of such an argument to be asserted in light of the Idaho authorities.

Commercial Securities vs. Hall, 140 Ore. 644, 15 P2d 483 which in turn quotes Farley vs. Western Insurance Co., 62 Ore. 41, 124 Pac. 199 is applicable here as saying:

> "The defense is unconscionable. Defendant sent its agent out to adjust and settle the loss, and he did settle the amount of it, agreed that his company should pay it. He was not a mere adjustee or investigator. He had authority to settle, as defendant admits. Defendant cannot send out an agent clothed with such authority and trick unsuspecting claimants into a reliance on his representations, and then repudiate them by attempting to hide behind obscure clauses in the policy. There is no question as to the amount of the loss and no serious question as to the representations made by defendant's agent; and, if defendant had required further formal proof, it should, in common honesty, have notified plaintiffs to furnish them."

Under the Idaho law the letter sent to the attorney of appellant by appellee through its corporate officer admitting an insurable interest, but stating "the interest is not one of ownership but rather one of equity", which was made on November 2, 1956, two weeks after the respondent through its agents H. Dean Petersen and Stanley Smith had determined the alleged activity of the employees of Supreme Trailer Sales regarding the disposition of the $2,000.00, binds the appellee either by waiver of defense or estoppel.

After the respondent through its agent received the premium it was and is estopped to declare a forfeiture springing from facts of which it or its agents were aware either from atcual knowledge or through the public records. Under Idaho law an insurer is not permitted to defeat a recovery upon an insurance policy issued by it by proving facts which would render the policy void where the insurer or its agents had actual or constructive knowledge of such facts.

Mull vs. United States Fidelity and Guaranty Co., 35 Ida. 393, 206 Pac. 1048;

Carroll vs. Hartford Fire Insurance Co., 28 Ida. 466, 154 Pac. 985;

Young vs. California Ins. Co., 55 Ida. 682, 46 P2d 718;

McDonald vs. North River Ins. Co., 36 Ida. 638, 213 Pac. 349;

Omaha Woodmen Life Ins. Soc. vs. Krussman, 131 F2d 83;

Scott vs. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S.E. 659.

and as guideposts to the direction of the Idaho law as pointed out:

"Much has been said in the briefs of counsel in this case with reference to the legal principle of mutual mistake, waiver and estoppel, and their applicability to the facts of this case. As we view the matter, the conduct of the insurance company's agent in writing a policy of insurance which did not disclose the true title or interest of plaintiffs, although they had stated the nature of that interest to the agent, knowledge of which therefore is imputed to the company, followed by the acceptance of premium on such policy by the company and the reliance of plaintiffs on its validity, effectually estops the insurance company from setting up the defense that the policy is void because the plaintiffs were not in fact sole owners of the property insured."

Carroll vs. Hartford Fire Ins. Co., 28 Ida. 466, 478, 154 Pac. 984, 988.

"An insurance company may elect, through its agent, to continue insurance with a new owner although

the policy provides it should be void for change of ownership."

Collard vs. Universal Auto Ins. Co., 55 Ida. 560, 571, 45 P2d 288.

Under an automobile liability policy, in Idaho, there is a primary liability against the insurer in favor of persons injured or damaged, of which the assured cannot by any act of his divest the injured party.

Collard vs. Universal Auto Ins. Co., 55 Ida. 560, 45 P2d 288;

Watson vs. Royal Indemnity Co., 56 F2d 409.

In the case at hand it does not seem that there could have been any question but that the appellant was in good faith. Here was a woman in a very small Idaho town. She met apparent agents of a trailer company who admittedly had not converted or stolen the trailer home albeit absconding with the money paid by appellant. She paid a consideration; furthermore she insisted that her lawyer help her with the matter. To spell out that there was not good faith or that she was not an innocent purchaser for value works an impossible hardship upon the facts as exist in this case.

Relevant dates show something much less than good faith on the part of appellee. The fire occurred September 23, 1956 (R. 24), was investigated that date by respondent's

Idaho resident agent and adjuster (R. 95). Proof of Loss was submitted October 18, 1956 (R. 52-53), and on same date the agents of respondent noted report of embezzlement on trailer (R. 96); then October 31, 1956 an Amended Proof of Loss was submitted (R. 52-53). After this on November 2, 1956 the letter sent from the office of secretary of appellee company stating in the first two paragraphs:

> "We acknowledge receipt of your letter dated October 13, 1956 enclosing therewith an amended and supplemental sworn statement in Proof of Loss under the contract in caption.
>
> "We concur with your thoughts that Mrs. Nelson does have an insurable interest in this trailer, however the interest is not one of ownership but rather one of equity" (R. 31-37 and exhibit thereto).

Then respondent on December 1, 1956, issued an endorsement to the very policy before this court (R. 167). Said endorsement amending the policy (R. 108). Although Proof of Loss was accepted (R. 62), payment was denied about December, 1956 (R. 63).

A check for premium refund was tendered to appellant at a deposition on May 2, 1957 (R. 66, R. 20)—over seven months after the fire damage and three months after suit was filed! At no time was a tender in cash made.

In spite of its contractual obligation and the admitted

damage the appellee was trying to "reneg" on its policy by paying less than that contracted for. It finally by "fishing" about found a possible asserted legal "jink" to void payment. A man who breaks his word is contemptible. A person or party not living up to a contract is reprehensible. We avoid dealing with them in the market place. One would be safer in dealing with a common bookie at a race track than with a company, no matter how formidable its assets or title, which breaks its moral obligations. Admittedly, arguments based on our Constitution are not in fashion, however, the sanctity of contract was thought so highly of when this Republic was formed that the following clear and unambigous language is to be found in the present Constitution as originally adopted:

> "No state shall . . . pass . . . law impairing the obligation of contracts, . . ."
>
> Article I. Section 10 (2)
> Constitution of the United States of America.

Note the words "impairing the obligation of contracts". It is not freedom to contract as so many of our rights are secured. but that the obligation will not be impaired. In other words, the moral value of living up to a contract, is not only the foundation of this society, but is written into our fundamental law. Appellee grasps at this ancient English doctrine originally adopted for life insurance and needlessly carried over into insurance law generally. We find nothing in the Idaho law that would exted this vicious, immoral and needless defense other than within strict limits. We consider the ar-

gument of sanctity of contracts extremely material to this cause. Government Bureaus and regulations flourish when the courts err. Liberty becomes lost when government control flourishes. Appropriate comments were made by the Alabama Court recently.

> "The position of the defendants seems to be that if murder results the insurance companies are, of course, sorry that the insured met with such a fate, but they have no liability if there is no insurable interest although they can treat such policies as completely void . . . In other words, the defendants seem to be of the opinion that the insurable interest rule is to protect insurance companies. We do not agree. The rule is designed to protect human life . . .
>
> "As we have shown it has long been recognized by this court and practically all courts in this country that an insured is placed in a position of extreme danger where a policy of insurance is issued on his life in favor of a beneficiary who has no insurable interest . . ."
>
> Liberty National Life Insurance Company vs. Weldon, (Alabama, 1957) 100 So.2d 696, 708.

Surely, if the moral circumstances of this case are considered, it is absolutely unfair and unjust and contrary to Idaho law or equity to hold that Beatrice Nelson is not en-

titled to fulfillment of the insurance contract. Furthermore, to allow an insurance company to raise the validity of the title of the appellant when the trailer company itself is not a party to this suit and does not claim an adverse title is almost ridiculous in its consequences. Realizing that insurance companies are in business to make money, it is still only legally and morally right that they be required to live up to their contractual obligations, and under the decision of this case, as determined by the trial judge upon the records, facts, and evidence as submitted to him, the insurance company is allowed to avoid its contractual obligation. Apart from the obvious result that the insurance company thus invokes a defense often disallowed even an innocent title holder in Idaho, the record shows the mischief in the rules of evidence. As against a title claimant the conversations of its agents are admissable while as against the insurance company the relevant conversations on what occurred in a purchase are not allowed as being hearsay not in the presence of the insurance company or its agents (R. 84)).

A paragraph should concern itself as to with whom the responsibility should lie for securing the factual information surrounding a prospective insureds right to ownership, status of title and right to possession. How simple and easy for the insurer to fully inquire of a prospective insured of all and any facts felt relevant by insurer as a condition to issuing a policy! An insured can do no more than state answers to inquiries by an insurer as to what the insurer feels is relevant. We submit, that the better rule extending insurable interest will

simply result in the insurer asking questions before issuing its policy.

Idaho has unequivocally adopted the rule of Al's Auto Sales vs. Moskowitz that where one of two innocent parties must suffer, the party who places another in a position to do harm should sustain the consequences; or, otherwise stated, the loss should fall upon the one who by its conduct created the circumstances which enabled the third party to perpetrate the wrong.

Dissault vs. Evans, 74 Ida. 295, 261 P2d 822.

But in the cause before the Court involving this insurance claim no innocent party need suffer. Application of Idaho law, prevents and prevented the purchaser Beatrice Nelson from losing ownership regardless of her not timely obtaining a certificate of title. In the present cause the actuarial considerations having been met, the identity of the trailer home having been definitely and conclusively established, the insured having paid the policy premium, application of the rule adopted by The Honorable District Court results in a windfall to appellee!! The appellee becomes unjustly enriched. The appellant in turn suffers a windfall loss. Should insured be responsible for the fire loss to any superior title claimant as a bailee by operation of law or conversion, although she prudently purchased insurance for fire protection, she would bear the loss out of pocket. In Idaho the law, good conscience and even-handed justice would prevent this. The Idaho law was not followed by the Court below.

Attention is called to a statement of the trial court concerning our cross-examination of the resident agent of appellee, who countersigned the policy of appellant.

> "The Court: I seriously doubt whether he comes in the category of a person subject to cross-examination under the Rule . . ." (R. 54).

It can be presumptively assumed the Court understood the Federal Rule allowing cross-examination of such agents. The misconception of Idaho law then is obvious. The Idaho Supreme Court has said in view of Sec. 40-901, Idaho Code, and Sec. 40-902, Idaho Code.

> "That an agent of a foreign insurance company who has power to solicit and take appliactions, collect premiums, and countersign and deliver policies, may bind his principal . . . or may waive a policy requirement . . . , and the company is estopped from denying authority to make such waiver . . ."
>
> Collard vs. Universal Automobile Ins. Co., 55 Ida. 560, 45 P2d 288.

The misconception or misapplication of Idaho law in this cause becomes even more manifest and plain.

The exact point at issue has not been decided in Idaho, but the decisions generally and analogous situations point clearly to the Idaho rule.

Respondent invoked its absolute right to removal for the plain and simple purpose of escaping the application of Idaho rules of law. It succeeded. The judgment of the lower Court, in effect, creates two bodies of substantive law in Idaho. The announced Idaho law as against the federal doctrine applying the law of five or six foreign states.

In order to effect a cancellation of a policy the insurer must tender the premium to insured, or the insurer cannot be heard to complain.

> "It is also thought that defendant failed to give the requisite notice. Granted that no particular form of notice is required, still it must be shown either that the insured has actual knowledge of the insured's intention to cancel, or that such intention has been so expressed as to give notice to the ordniary man in the exercise of ordinary care."
>
> Grant Lumber Co. vs. North River Ins. Co. of N.Y. (Dist. Idaho) 253 Fed. 83 (Excellent discussion on premium refund).

Thus under Idaho law a policy cannot be cancelled without notice of such cancellation given to the insured, and " 'the policy not being rightfully cancelled, it remained in full force and effect, . . .' ".

> McDonald vs. North River Ins. Co., 36 Ida. 638, 646, 213 Pac. 349, 351.

The rules of law of Idaho have been so set forth to preclude the injustice which has thus far been worked in this case. In this case the record shows a total failure of the insurer to abide by the contract terms in declaring a cancellation of what insurer felt to be a void contract. Although there are rules of law in other jurisdictions to the contrary, under the rules of law of the state of Idaho such following of the contract terms to cancel a void policy has in the above cases been dogmatically and unequivocally held to be an absolute necessity.

Attention is chiefly called to paragraph 13 of the conditions set forth in the policy as well as paragraph 2 of the conditions of the policy (Exhibit 4). Although the cancellation provision 13 requires the insurer to mail or deliver to the insured written notice stating when not less than five (5) days thereafter, such cancellation shall be effective, neither New Hampshire Fire Insurance Company nor its agents ever mailed to Beatrice Nelson or delivered to Beatrice Nelson such cancellation notice or stated when it would be effective or otherwise met any conditions to void the policy. We submit the Idaho law is plain on this. The asserted defenses are thus not allowable and the insured must be and should be paid.

In summary, the Idaho law favors the insured, never allows forfeiture of an insured's right once a premium is paid, has expressly held that a purchaser for value has an "interest" and even ownership in a motor vehicle regardless of failure to secure a certificate of title, and nowhere in such

law is there found the vaguest hint that title defects defeat an insurable interest, rather the contrary being plain by analougous situations, that a title certificate is in no way related to insurable interest or to an insured's right to recover. And the evidence shows no cancelling or voiding of the policy by insurer.

This contract of insurance having been entered into after effective date of Section 41-1403, Idaho Code, the insurer having failed to meet its contractual commitment, attorney fees "as the Court shall adjudge reasonable" should be awarded. We submit that the record in this cause shows at least one thousand five hundred dollars ($1,500.00) would be a reasonable sum to award respondent for attorney fees.

It is submitted, therefore, that judgment should be rendered for and on behalf of the appellant, Beatrice Nelson, in this action against New Hampshire Fire Insurance Company for the sum of four thousand six hundred twenty-seven and 50|100 ($4,627.50) Dollars stipulated damage to the trailer home insured, and one thousand five hundred and no|100 ($1,500.00) Dollars attorney fees, or for the total sum of six thousand one hundred twenty-seven and 50|100 ($6,127.50) Dollars, and costs of this action incurred.

L. CHARLES JOHNSON

GEORGE R. PHILLIPS

Attorneys for Appellant
Residence: Pocatello, Idaho

APPENDIX

EXHIBITS

Plaintiff's			
1. Proof of Loss	R 52	R 52	R 52
2. Amended Statement	R 52	R 52	R 52
3. Insurance Policy	R 53	R 53	R 54-55
4. Bill of Sale	R 57	R 57	R 57
5. Check	R 57-58	R 58	R 58
6. Invoice	R 58-59	R 59	R 59
14. Endorsement	R 106-108	R 108	R 109
Defendant's			
8. Photograph	R 70	R 72	R 72
9. Photograph	R 70	R 72	R 72
10. Photograph	R 70	R 72	R 72
11. Memorandum	R 90	R 91	R 91
16. Freight Bill	R 119-120	R 120	R 120
18. Inspection Sheet	R 138	R 139	R 139

I certify that I mailed three copies of the above Brief of Appellant by depositing three copies thereof, on the eighteenth day of July, 1958, with sufficient postage on envelope in the United State Government mail receptacle addressed to the following:

J. F. MARTIN,
C. BEN MARTIN,
P. O. Box 2184,
309 Idaho Building,
Boise, Idaho

L. CHARLES JOHNSON

.....

Attorney

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Eastern Division

J. F. MARTIN
C. BEN MARTIN
Attorneys for Appellee
Residence: Boise, Idaho

SEP 2 1958

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Eastern Division

J. F. MARTIN
C. BEN MARTIN
Attorneys for Appellee
Residence: Boise, Idaho

INDEX OF SUBJECTS AND POINTS MADE

Page Reference

AGENCY:

- Agency being shown puts a purchaser on notice and inquiry as to title and right of agent to sell 7
- Agent's own statement is no evidence of his agency or authority 6
- Apparent authority: The doctrine does not apply to cases where the agent deals in his own name 5, 14

Affirmative Defenses sustained by the proof 16

Appellant is not an innocent purchaser 22, 23, 24

Bill of Sale obtained from an embezzler is void 17

Buying while charged with notice that a seller has no title and is without authority to sell results in a void contract under which no insurable interest passes 5, 6, 8, 13, 15

Cases cited by appellant reviewed 11, 12, 13, 14

Certificate of Title is requisite in Idaho before any insurable interest can be acquired under the facts of this case 17, 18, 21, 22, 26

Conclusions of Law discussed and vindicated 14

Dissault Case distinguished (Dissault vs. Evans) 19, 20, 21

Doctrine of Apparrent Authority is inapplicable to this case 5

Duty of Disclosure: Where applicant for insurance undertakes to state the facts she must fully disclose, and failed to do so here 8

Evidence fully sustains the judgment 16, 24, 25, 26, 27

Innocent Purchasers discussed 6, 7

Lux vs. Lockridge distinguished 18, 19, 21

Preliminary objection to review 2

Purchaser must ascertain ownership and title at his own peril 4

Purchaser from one not the owner derives no insurable interest, his title being no better than that of his vendor 4, 5

Questions Presented discussed 1, 17, 26, 27

Rules of 9th Circuit Court of Appeals involved (Rules 18(d) and 20) show there is no reviewable issue here 2, 3

Specifications of Error (General Reference) 1

Specifications of Error discussed and shown to be without merit:

I (a), (b), (c) 3 seq

I (d) 8

I (e) 8

I (f) 13

I (g) 13

II, II (b) 14

III 15

IV 16

V 16

VI, VII, VIII 17

Sufficiency of the evidence shown 16, 24, 25, 26, 27

Statement of Points referred to 17

Tender back of premium paid 13, 27

Void contracts are but blank pages creating no insurable interests 10, 11

Waiver of objections and right to review here is established by introduction of evidence on appellant's part and her failure to object 15

TABLE OF AUTHORITIES

Cases Cited

Al's Auto Sales vs Moskowitz
203 Okl. 611, 224 P. (2) 588 — 21, 24

Blackwell vs. Kercheval
29 Idaho 473, 160 Pac. 741;
2 Am. Jur. 200, #248;
2 Am. Jur. 80, #98. — 5

Brutinel vs. Nygren,
17 Ariz. 491, 154 Pac. 1042;
L. R. A. 1918 F, 713. — 7

Chamberlain vs. The Amalgamated Sugar Company
42 Idaho 604, 247 Pac. 12. — 6

Chicago & E.I.R. Co. vs. Collins Produce Co.
249 U. S. 186, 63 L. ed. 552, 39 S. Ct. 189;
3 Am. Jur. 430 — 15

Cox vs. Crane Creek Sheep Co.
34 Ida. 327, 200 Pac. 678. — 6

Cupples vs. Stanfield
35 Idaho 466, 207 Pac. 326. — 6

Dissault vs. Evans
74 Ida. 295 (299), 261 Pac. (2) 822. — 19, 20, 21

Dumas vs. Bryan
35 Ida. 557, 207 Pac. 720. — 10

Evans vs. City of American Falls
52 Ida. 7, 23, 11 Pac. (2) 363. — 10

Federal Land Bank vs. McCloud
52 Ida. 694, 703, 20 Pac. (2) 201. — 4, 5, 13

Giles vs. Citizens Ins. Co.
32 Ga. App. 207, 122 S.E. 890. — 10

Hessen vs. Iowa Auto. Mut. Ins. Co.
195 Iowa 141, 190 N.W. 150,
30 A.L.R. 657. 9, 13

Klam vs. Koppel
63 Ida. 171, 118 Pac.(2) 729. 4, 13

Klundt vs. Backtold
110 Wash. 594, 188 Pac. 924 5

Lux vs. Lockridge
65 Ida. 639, 150 Pac.(2) 127 18, 21

Madill vs. Spokane Cattle Loan Co.
39 Ida. 754, 758, 230 Pac. 45. 6

Maryland Cas. Co. vs. Orchard L.& T.Co.
CCA (9) 240 Fed. 364. 2

Migeon vs. M. C. RR. Co.
CCA (9) 77 Fed. 249. 2

Mountain States Impl. Co. vs. Arave
50 Ida. 624, 2 Pac. (2) 314 10

Naccarato vs. Village of Priest River
68 Ida. 368, 195 Pac. (2) 370 15

Niagara Fire Insurance Co. vs. Layne
162 Ky. 665, 172 S.W. 1090. 11

Occidental Life Ins. Co. vs. Thomas
107 Fed. (2) 876. 3

Peck vs. Shell Oil Company
142 Fed. (2) 141 (CCA 9). 2

Trustees vs. Williams
102 Wisc. 223, 75 N.W. 954
69 Am. St. 912 5

Tuttle vs. Campbell
74 Mich. 652, 42. N.W. 384
16 Am. St. 652 5

Waterford Irr. Dist. vs. Turlock Irr. Dist.
50 Cal. App. 213, 194 Pac. 757 5

RULES OF THE COURT

Rule 18 (d) - Rules of 9th Circuit Court of Appeals 3

Rule 20 - Rules of 9th Circuit Court of Appeals 3

STATUTES

Section 49-101ee 18

Section 49-107 Idaho Code 18

Section 41-201 (14), Idaho Code 11

Section 49-401, Idaho Code 17, 18

Sections 49-403-416 Idaho Code 18

Section 49-839 Idaho Code 18

Section 49-845 Idaho Code 18

Section 49-701 Idaho Code 18

Section 64-207 Idaho Code 4

ENCYCLOPEDIAS AND TEXTS

2 Am. Jur. 80 #98 5

2 Am. Jur. 69, 82. 14

2 Am. Jur. 200 #248 5

3 Am. Jur. 430 15

26 Am. Jur. 438, #450 8

29 Am. Jur. 289 (cases in Note 3) 10

29 Am. Jur. 293 #322 11

29 Am. Jur. 438, #540 8

46 Am. Jur. 624, #460	7, 9
53 Am. Jur. 129 #144	15
26 C. J. 32, Note 84	9
7 R. C. L. 886	5
Restatement of Agency #8	14

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON,

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

REPLY TO APPELLANT'S BRIEF

The record contains a STATEMENT OF POINTS (R pp. 154-158).

In the Brief of Appellant there is contained a Section captioned QUESTIONS PRESENTED. (pp. 2-4).

At pages 10 to 13 of Brief of Appellant is a section entitled SPECIFICATIONS OF ERRORS.

It is assumed that the intention of appellant

is to rely upon the specifications of errors as elaborating the "Questions Presented."

For that reason, in this reply brief, the answers are directed primarily to the specifications, and by way of summation to the "Questions Presented."

PRELIMINARY OBJECTION TO REVIEW

At the outset, appellee respectfully suggests that there are no questions properly before this court for review. The absence of objections in the record, and the introduction of evidence without objection on both sides, point up the application of Rule 18(d) and Rule 20.

As the rules are understood, it is the duty of the appellant to particularly point out the alleged error upon which she relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found, and in questioning evidence to quote the grounds urged at the trial and the full substance of the evidence admitted or rejected. Without such compliance there is nothing here for review.

Peck vs. Shell Oil Company
142 Fed. (2) 141 (CCA 9);

Maryland Cas. Co. vs. Orchard L. & T. Co.
CCA (9) 240 Fed. 364.

Migeon vs. M. C. RR. Co.
CCA (9) 77 Fed. 249;

Rule 18 (d) Rules of 9th Circuit Court of Appeals;

Rule 20 Rules of 9th Circuit Court of Appeals.

The specifications of error are replied to seriatim as follows:

I.

(a) The language "not affecting the value thereof" in the last part of Finding of Fact IV is supported by the testimony of plaintiff (R 70-71) and the Exhibits 8 and 9 (R 71-72). By the exhibits and the testimony of the witness the question of materiality of damage was for the trial judge, and the finding represents his conclusion upon a question of fact, which this court will not review, there being supporting evidence in the record.

Occidental Life Ins. Co. vs. Thomas 107 Fed. (2) 876.

(b) The language in Finding of Fact V indicating that appellant was "fully conversant" with prices and values of trailer houses is a mere summation, amounting almost to a paraphrase of the testimony of appellant (R 65-66) on cross-examination.

(c) The complaint against Finding of Fact VI, in which it is found that "the plaintiff knew or by exercise of any degree of care or caution should have known that neither the said Roberts nor the said Pauls had any right, title or interest in or to

said trailer house" etc. is without merit, both on the facts and the law, for the following reasons:

1. It is the settled law of Idaho that one who purchases property must at his peril ascertain the title and right of the vendor to sell:

Klam vs. Koppel, 63 Idaho 171, 118 Pac. (2) 729;

Fed. Land Bank vs. McCloud, 52 Ida. 694, 703 20 P. (2) 201.

2. It is shown by the evidence that the conveyance taken by appellant was signed by Roberts and Pauls as grantors, neither as agents nor otherwise than in their own right, (Bill of Sale, Exhibit 4) payment being made directly to them (R 56) by check cashed by them, one of the payees, Pauls, being wholly unknown to the trailer manufacturer (R 121, 137). It is perhaps significant that Pauls' signature appears first as a grantor in the bill of sale.

The statute of the State of Idaho covering such sales is Section 64-207, Idaho Code, which provides, in relevant part:

"1. Subject to the provisions of this law, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The Supreme Court of Idaho applied the

foregoing rule of law in Federal Land Bank vs. McCloud, 52 Ida. 694, 20 Pac. (2) 201, saying:

"The McClouds attempted to sell property in which they had no title. The principle is well settled that a seller of personal property can convey no greater title than he had, and it makes no difference that the purchaser has no notice and is ignorant of the existence of other parties in interest (7 R.C.L. 886; Klundt vs. Bachtold, 110 Wash. 594, 188 Pac. 924; Tuttle vs. Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am.St. 652; Trustees vs. Williams, 102 Wis. 223, 75 N. W. 954, 69 Am. St. 912; Waterford Irr. Dist. vs. Turlock Irr. Dist., 50 Cal. App. 213, 194 Pac. 757). One who buys property must, at his peril, ascertain the ownership; and if he buys of one having no authority to sell, his taking possession in denial of the owner's rights is a conversion."

3. Where the transaction is had in the names of the agents, not in the name of the principal, the doctrine of apparent authority is not applicable, and the transaction is void.

Blackwell vs. Kercheval
29 Idaho 473, 160 Pac. 741;
2 Am. Jur. 200, #248; 2 Am. Jur. 80, #98.

4. Upon the face of the evidence, the finding of the court is amply supported, it being clear that (a) the purchase was made from Roberts and Pauls in their own names (Exhibit 14); (b) the purchase was made at a price which appellant knew to be less than half the minimum value of the trailer (R 66); (c) appellant admitted she knew the trailer was merely in transit and being hauled to

a purchaser in Boise (R 60); (d) appellant had in mind inquiry as to authority of Roberts and Pauls to sell, stating (R 56):

"I examined the trailer and I asked these two gentlemen if they had authority to sell it"

and (e) making it clear that she was dealing with them, and them alone, not with the owner-manufacturer, with whom she made no contact (R 56 72). The only basis for belief that Roberts and Pauls had authority to sell was in their statement to that effect, which has been so frequently held worthless as any proof of authority as to be null as a matter of axiom.

Chamberlain vs. The Amalgamated Sugar Company 42 Idaho 604; 247 Pac. 12;

Cupples vs. Stanfield
35 Idaho 466; 207 Pac. 326;

Madill vs. Spokane Cattle Loan Co.
39 Ida. 754, 758; 230 Pac. 45;

Cox vs. Crane Creek Sheep Co.
34 Ida. 327; 200 Pac. 678.

5. It is thus made eminently clear that appellant bought from men who neither had title nor authority to sell, and was on notice, and made no inquiry, and acquired no interest in the house trailer whatever by such a pact.

6. Under these circumstances the charge that appellant was "unequivocally an innocent purchaser for value under the laws of the State

of Idaho" falls in a hopeless mire. As is said in

46 Am. Jur. 624, #460,

> "So long as the possession of goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or to affect it, than a mere thief." (Underlining supplied)

Of such a situation, nullifying the notion of innocent purchase, the Supreme Court of Arizona said, in

Brutinel vs. Nygren,
17 Arizona 491, 154 Pac. 1042;
L. R. A. 1918 F, 713:

> "The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing, suggests the duty to stop, look and listen; and if he would bind the principal, is bound to ascertain not only the fact of agency, but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises."

Otherwise the buyer is by no means innocent, indeed is not even a purchaser. Contrary to the position of appellant, the record makes it manifestly clear that she saw an opportunity to buy a Six Thousand Dollar trailer house for Two Thousand Dollars and siezed the opportunity without asking questions which would inevitably have stopped the deal. This is not "innocent purchase."

(d) Specification of Error I (d)

Finding of Fact VIII is without merit, in that it ignores the duty of disclosure on the part of an applicant for insurance. It is shown in the record (R 60) that appellant undertook to state the circumstances of her supposed acquisition of the title to the trailer house. It is the rule in such cases, differing from the cases involving "no evidence of any refusal by appellant to answer any inquiry", that

> "if the insured undertakes to state all the circumstances affecting the risk, a full and fair statement of all such circumstances is required."
>
> 29 Am. Jur. 438 #540.

In her testimony, appellant undertook to detail her purchase, omitting any mention of the crux of this case, i.e., that the men she bought from had no right to sell to her. So far as her testimony shows, she carefully omitted mention of the owner-manufacturer in applying for insurance (R 60). The facts were not disclosed, the burden of disclosing the same existed, and the finding conforms both with the evidence and the law.

(e) The attack on Finding of Fact IX, objecting to the finding that at the time plaintiff applied for and procured the insurance policy she had no insurable interested in the trailer house, is asserted in the brief (p. 15) to be "the essential question in this litigation." We therefore examine it in especial detail here:

It is an ancient and well established rule that

"Where no title or possibility of title has passed there is no insurable interest"

Note 84, 26. C. J. 32.

This is but a short, pointed statement of the rule commonly recognized, that

"a person has no insurable interest in a thing where his only right arises under a contract which is void or unenforceable either at law or in equity."

Hessen vs. Iowa Auto. Mut. Ins. Co.
195 Iowa 141, 190 N.W. 150,
30 A.L.R. 657.

In the above case, supposed title originated in theft, and the purchaser bought in good faith, not knowing of the theft. Held, that there was no insurable interest.

We have pointed out under 6 supra that

"So long as the possession of goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or to affect it, than a mere thief." (46 Am. Jur. 624 #460). (Underlining supplied)

Indeed, it appears that a mere theft by a stranger, is less morally reprehensible than the case of the transportation employee who is trusted with property and sells it in his own name for his own benefit and leaves for parts unknown. As far back as ancient Biblical times there has been a special category of reproach embodied in the words "mine own familiar friend hath lifted up the heel against me." Appellant

certainly acquired no more from Pauls, the interloper, and Roberts, the breaker of trust, than from a common thief, to-wit, absolutely nothing; and that is not insurable.

Giles vs. Citizens Ins. Co.
32 Ga. App. 207, 122 S. E. 890.

It is the general rule, stated in

29 Am. Jur. 289 (cases in Note 3)

that an insurable interest is necessary to the validity of an insurance contract, whatever the subject matter of the policy, whether upon property or life, and that no insurable interest existing, the contract is void.

The Idaho Supreme Court has made it clear, in

Mountain States Impl. Co. vs. Arave
50 Ida. 624, 2 Pac. (2) 314;

Dumas vs. Bryan
35 Ida. 557, 207 Pac. 720

that what is void in law is of no effect whatever, being just the same thing as a blank page, establishing no rights and imposing no duties. An excellent illustration of the force given to this rule is found in

Evans vs. City of American Falls
52 Ida. 7, 23, 11 Pac. (2) 363.

Against a claim of title resulting from a judgment and execution sale, the judgment being void, the court said:

"An execution issued without a judgment or decree to support it is void and confers no authority on the officer to whom it is directed, and if there is no judgment as the basis for the

> execution the purchaser acquires no title. The judgment is the sole foundation of the official power to sell and convey property, and if there is no judgment he is without power to sell, and all his acts under an execution issued in such case are without authority and void." (Underlining supplied)

A fortiori, where the pretended power to sell is couched in embezzlement, any contract of sale is void. The position taken in the brief that recording a bill of sale, void in its entirety, is some evidence of insurable title, falls by the wayside, just as the sale on execution levy without a valid judgment fell.

Upon the same basis, the Kentucky court, in

> Niagara Fire Insurance Company vs Layne
> 162 Ky. 665; 172 S.W. 1090

clearly and rightly held that a purchaser from one who had no authority to sell acquires no insurable interest.

The Idaho Statute defining insurable interest is quoted at p. 15 of appellant's brief (Section 41-201(14) Idaho Code as amended). This statutory definition is declarative of the well established general law of the subject (29 Am. Jur. 293 #322) and in no way in conflict with the rules above set forth.

Examination of the cases cited by appellant discloses no precedent for the anomalous position that a buyer from the equivalent of a thief thereby acquires an insurable interest. Briefly reviewing them it is seen:

At page 17, the reference is to record title and

equitable title, unquestioned, substantial property rights, held insurable. Not in point here.

At pages 18 and 19 the reference (as shown at the end of the quotation on page 19) is to "defeasible, contingent, inchoate or partial interests." Not in point here.

Examination of the cases cited on page 20 discloses that they relate to valid contracts, under which a definite right of property is legally existent, although neither involving title, lien or possession. That such contracts give rise to insurable interests is conceded, but the cases are not in point here.

At page 21 the references are to contingency interests, bailments or trusts. Nothing of the sort is involved here.

At the bottom of page 21 and top of page 22 of appellant's brief occurs an abstract statement which appears to go far beyond anything recognized in Idaho law in defining insurable interests. The definition is obscure because of the use of the word "interest" in the definition itself. If it is actually intended by appellant to say that anyone having any concern for the safety of an object has an insurable interest in it, then the cases cited do not support the rule as so stated. Taken literally, and at its face, a rule so stated would render the courtroom of this court insurable in the names of the litigants here present, all of them being concerned for its safety.

At page 22 a reference is made to "qualified interests." Examination of the cases cited discloses that the interests involved were subsisting rights, substantial, and not by any means void.

At the bottom of the same page reference is made to insurability of a "right of possession." Appellant, occupying the position of a joing tortfeasor (Klam vs. Koppel, 63 Ida. 171; 118 Pac. (2) 729) had no right of possession. The point, and the cases cited, are irrelevant.

At page 23, the reference is to rights of a bailee. No such issue is present here.

The most diligent review of the cases cited by appellant fails to disclose a parallel to the present situation, and we are forced back to the initial premise that one who has no more right or title than a thief cannot pass any more right or title than a thief, and his attempt to do so produces no insurable interest (Federal Land Bank vs. McCloud, 52 Ida. 694; 20 Pac. (2) 201; Hessen vs. Iowa Auto. Mut. Ins. Co., 195 Ia. 141; 190 N.W. 150; 30 A.L.R. 657).

(f) The record shows that the premium paid by appellant was tendered back to appellant as soon as the facts were ascertained, and the tender is still in force (R 20, 42) and so found by the trial judge.

(g) Specification of Error I (g) attacks Finding of Fact XI on the point that appellant had no insurable

interest. This has been covered above in part, and is more fully covered in this brief hereafter.

II.

The second Specification of Error consists of three parts (a) relating to apparent authority of Joseph Roberts, (b) relating to insurable interest, and an unlettered paragraph charging error in Conclusion of Law IV, V and VI "for the reason that the Trial Court misconceived and misapplied Idaho law."

Subdivision (a) is answered as follows:

> "Apparent, or, as it is also called, ostensible authority, on the other hand, may be defined as that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing." (Underlining supplied)
>
> 2 Am. Jur. 69, 82.
> Restatement of Agency #8.

The manufacturer-owner of the trailer house held out nothing by way of representation to appellant relating to sale or passing of any right whatever in the same. And the other man, Pauls, as an interloper merely joined in a conversion.

Subdivision (b) is answered as follows:

The Conclusions of Law attacked (II and III) follow the Findings of Fact IX and XI, the attacks on which are disposed of under I (e) and (g), supra.

The unlettered paragraph attacking Conclusions of Law IV, V and VI, which recite (IV) that appellee

has no liability to appellant, (V) that appellant is not entitled to recover, and (VI) that appellee is entitled to judgment against appellant and costs, merely recites that the Trial Court misconceived and misapplied Idaho law. The whole of this brief is pointed to a contrary position, and without a more definite statement in the specification as to wherein the trial court so misconceived and misapplied the law, the paragraph cannot be otherwise more fully answered.

III.

The third Specification of Error asserts that the matter of the way by which any "insurable interest" in appellant was acquired was irrelevant hence the trial court erred.

The appellant introduced the initial evidence on this subject on her own direct examination (R 56). The objection, if it was ever proper, which is denied, was conclusively waived by introduction of the same evidence on the part of appellant.

Naccarato vs. Village of Priest River 68 Ida. 368, 195 Pac. (2) 370;

53 Am. Jur. 129 #144;

Chicago & E. I. R. Co. vs. Collins Produce Co. 249 U.S. 186; 63 L. ed. 552; 39 S.Ct. 189;

3 Am. Jur. 430.

IV.

Specification IV alleges insufficiency of the evidence to support the affirmative defenses of appellee and the judgment, and as a conclusion states that the appellee failed to void the insurance contract sued upon. The specification does not indicate wherein the proof falls short, and requires this court to search the record, which it is not bound to do.

Nevertheless, the proof shows the defenses sustained as follows:

1. Appellant, buying from Pauls and Roberts, who were completely without ownership and authority to sell, acquired nothing insurable (R 56, 68, 70, 72, 75, 76; Exhibit 4 and cases cited supra herein).

V.

Specification V avers that the evidence discloses, without contradiction, the appellant entitled to recover $4,627.50 and attorneys' fees. Again: The contradicting evidence is clear: Appellant bought for $2000.00, less than half of what she now claims, a trailer house she knew to be worth at least Five Thousand Dollars (R 56, 68) under such circumstances that she was on complete notice, yet without any effort to communicate with the owner of the vehicle (See I (c) supra).

VI., VII, and VIII.

The final three specifications of error may be disposed of together, since all three involve the same assertion, that the law of Idaho is against the judgment, and consequently that the appellant is deprived of her freedom and right to contract. Fundamentally the objections run to the definition of an insurable interest and the question of title of the appellant. Reading the specifications appellant's Statement of Points (R 154-157 inc.) and the Questions Presented (Brief pp. 2-4) it is clear that appellant stands on two propositions, (1) that she acquired an insurable interest by the Bill of Sale procedure which she adopted (R56-57) in lieu of the statutory title procedure, which she admits she did not invoke (R 72, 87, 89, 122-123) and (2) that the statutory procedure is not applicable to trailer house title, or at least not applicable in this instance.

Section 49-401 of the Idaho Code provides as follows:

> "49-401. Definitions.--The following words and phrases when used in this chapter shall, for the purposes of this chapter, have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:
>
> a. 'Vehicle.' Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon

stationary rails or tracks.

b. 'Motor Vehicle.' Every vehicle, as herein defined which is self-propelled and every vehicle designated to be drawn upon a public highway behind and in conjunction with a self-propelled motor vehicle, provided there shall be excluded herefrom every such vehicle so drawn, excepting house trailers, whose unladen weight is less than two thousand pounds. * * *.
(Underlining supplied).

Section 49-401 (b) defining motor vehicles, includes house trailers within its terms, regardless of weight, excluding from its terms only non-house trailers weighing less than two thousand pounds. The construction placed upon this section in appellant's brief is strained, creating an ambiguity by ignoring the punctuation placed in the Section by the Legislature. When the section is read as in pari materia with the other sections relating to registration (49-101ee, 49-107, 49-155), title (49-403 to 49-416) equipment (49-839; 49-845) and operation (49-701 seq.) there can be no doubt at all that title to house trailers must be acquired and transferred in conformity with the motor vehicle code.

The Idaho cases cited by appellant do not sustain appellant's position. This is demonstrated as follows:

In Lux vs. Lockridge, 65 Ida. 639; 150 P. (2) 127, the Supreme Court did not decide the question whether or not failure to procure title certificate as required by statute renders a sale void. Witness the

words of the same court in Dissault vs. Evans, 74 Ida. 295 (299); 261 P. (2) 822:

> "That case expressly did not decide whether the failure to pass the certificate of title as required by the statute made the sale void."

The Dissault case supra, itself, relied upon heavily in the appellant's brief, is completely wide of the point. In it, the court said

> "The decision here is not based strictly upon estoppel, but on the proposition that appellants while insisting upon a strict adherence to the necessity of having a title certificate, themselves never had a title certificate which complied with the law" * *.

On its facts, the Dissault case bears no remote resemblance to the present issues. In that case Pocatello Auto Dealers Association bought a car from Motor Center. Ed Barrett was president of the Association, and Motor Center was his own assumed business name. He took title in the usual manner in his own name and endorsed the certificate on the reverse for transfer, as did the finance company which was involved. Then Barrett, acting for the association, which had retaken the car from Pocatello High School, to which it had been loaned, sold the car to Evans. The Supreme Court said of this

> "There is no dispute in the record the automobile was voluntarily and intentionally turned over to Barrett for the purpose of having it sold; there is no contention that the price paid by respondent was inadequate", (Underlining

supplied),
and Evans paid out the purchase price on that sale in full, to Barrett. Barrett failed to pay the money over to his employer, the automobile association. In the suit in replevin by the automobile association, the Supreme Court inevitably held that Barrett was its agent for the purpose of sale, he had received payment in full, and the association, having never procured a title for itself was hardly in position to complain of Evans, who had left the title matter up to Barrett and the second finance company.

Comparing the situation there with that in the present case, the basis for the ruling of the trial court, which in effect distinguishes the Dissault case, is manifest. Summarized, it is this:

Roberts was a transportation agent only; Pauls was an interloper; neither had any authority to sell, nor any title evidence; enroute in the course of a delivery, Roberts, with Pauls conniving, having neither ownership nor muniments of title, stopped the trailer in transitu, and purported to sell it as the property of Roberts and Pauls, for less than half its value, to a purchaser who, being warned of defective title by her attorney, who told her the bill of sale she got was no better than the man who gave it (R 89) and asked her if she knew them and received a negative answer (R 89), yet made no contact with the true owner and procured no Idaho title as required

by law. Nor could she have done so with the instrument she received. The Dissault case is the converse of what it is viewed by appellant to be, and merely holds, recognizing the full force of the statute, which is applicable here, that under the peculiar facts in that case, the plaintiffs there could not maintain an action in replevin.

The cases from other jurisdictions are of no help here. It was pointed out in the Dissault case by the Supreme Court that it is futile to find the solution to our statutory problem in the decisions in other states, which are hopelessly in confusion.

There is some assistance in the case of Lux vs. Lockridge, above cited. The Supreme Court did there hold (65 Ida. loc. cit. 643)

> "We are impressed with the cogency of the reasoning in Swartz vs. White, 80 Utah 150, 13 Pac. (2) 643, to the effect that a purchaser not receiving the certificate of title is not a bona fide purchaser for value" ***.

It is also to be noted that the position taken by the appellant here is that which was taken by Justice Ailshie in his dissenting opinion in Lux vs. Lockridge which has never, contrary to the assertion in appellant's brief, been modified.

In the Dissault case the Supreme Court stated that it was "impressed" with the decision in Al's Auto Sales vs. Moskowitz, 203 Okl. 611, 224 Pac. (2) 588, where a certificate of title statute similar to ours was

relied upon by the assertedly true owner as herein. In the quotation from that case, the Supreme Court noted language which affords a criterion for decision in this case. It is this:

> "There was nothing recorded or otherwise to bring to the attention of defendant Moskowitz (respondent Evans) the true ownership of the automobile. He had no notice, actual or constructive."

Applying that test to the facts shown in the record it is at once seen that appellant was fully warned, put on notice, and yet deliberately proceeded in the teeth of the statute. The evidence so showing is as follows:

1. At page 56 of the transcript appellant stated: "I examined the trailer and I asked these two gentlemen if they had the authority to sell it." "Authority to sell it" implies and clearly admits that appellant knew that the men she interviewed were not owners, but claiming to have "authority to sell."

2. Exhibit 4, received on appellant's identification, conflicts, showing Roberts and Pauls as vendors (R57).

3. At page 60 of the transcript appellant testified "I explained to him that it (the trailer house) was going through with a convoy and these two gentlemen had wrecked the trailer and offered to sell it to me because it would be rejected when they got to Boise where they were taking it and they would

have to trail it back to Texas. And they gave me a good - what I thought was a good buy on it - and so I had purchased it" * * *. (Underlining supplied).

This testimony is subject to no construction except that the true owner was neither Roberts nor Pauls. It also makes clear that Roberts and Pauls had no power of disposition. Otherwise there would be no reason for saying that the trailer would have to be trailed "back to Texas". If Roberts and Pauls had power to sell at American Falls, they had power to sell at Boise. Moreover, this testimony clearly admits that appellant knew that there was a purchaser at Boise to whom the trailer house was being transported. Otherwise there is no meaning in the words "it would be rejected when they got to Boise."

4. Actually, appellant had direct knowledge concerning the Boise purchaser. At R 67-68 appellant testified: "I imagine that it would have cost that much had I gotten it at a trailer court, but they had a Bill of Sale - no - it wasn't a Bill of Sale, they had a paper that they were to deliver it for four thousand at Boise". (Underlining supplied) Appellant is thereby most clearly shown to have known that the function of Roberts and Pauls was that of delivery agents, not vendors. "They were to deliver it", and she saw the paper (Exhibit 6, R 68) in which the true owner is designated, and heard the men who sold to her talk about the company. This is manifest from

appellant's statement (R 69):

> "They told the lawyer that they were in authority to act for the company."

Further, appellant added:

> "Well, they said they had damaged it and they would sell it at a bargain rather than take it into Boise and it would be rejected and they would have to take it back to Texas and they would sell it at that price rather than trail it clear back to Texas."

5. In the record (R 73) appellant testified as follows:

> "Q. Now isn't it a fact that you, in your deposition, you stated they told you that they would send you a Certificate of Title?
> A. They told Mr. Loofborrow that they would."

This is the clearest possible evidence that appellant went into the details of title, bringing her into the category of one on notice. Whereas, in the Dissault case (the quotation from Al's Sales vs. Moskowitz, supra) "there was nothing recorded or otherwise to bring to the attention of defendant the true ownership of the automobile" the exact opposite is shown to be true here.

On the other side of the evidence, it is shown without dispute, by the witnesses for the appellee that no certificate of origin ever issued to appellant (R 124), she was totally unknown to the true owner (R 131) and never had any communication with the owner (R 131), sales by drivers were never permitted, their function being that of delivery only (R 129), Roberts (who was

the one who actually made the representation that he had authority to sell (R 73) was not a salesman for the company (R 129), he abandoned the truck which hauled the trailer, at Garden City, Idaho, where it was found by police (R 130) and a warrant is out for his arrest (R 130-131) on a complaint charging him with embezzlement of the trailer (R 131). Specifically, it is established by the witness Franks (R 131) that Roberts had no authority to sell to appellant:

> "Q. Did Joseph R. Roberts have any authority to sell trailer No. 6995, identified as Defendant's Exhibit 1, (now known as plaintiff's exhibit No. 6) to Beatrice Nelson?
> A. No, his instruction was to deliver it to Aetna Trailer Sales at the ir Boise, Idaho, location.
> Q. Did Joseph R. Roberts ever have authority to deliver that trailer to Beatrice Nelson?
> A. No, he did not."

It is further established that the owner never transferred titles except by the issuance of certificates of origin (R 132-133). In all these matters the testimony of Franks is corroborated by that of Riley. As to Pauls, he was unknown to the owner (R 137).

It is of importance to note that in the practice of the company, a damaged trailer would not "have to be trailed clear back to Texas" as stated by appellant, but the matter of the damage is adjusted by interoffice sheets (R 138-139) a fact established without objection (R 139).

SUMMARY

Turning, in conclusion to the "Questions Presented" (Brief of Appellant p. 2 ff.) answers are returned as follows:

1. The District Court not only could, but was obliged upon the evidence to hold that Beatrice Nelson was not a bona fide purchaser for value, she being on full notice and buying at a "hot" merchandise price, if use of the vernacular may be allowed.

2. The trial court correctly concluded that in the State of Idaho a certificate of title is a condition precedent to acquiring an insurable interest in a trailer home, it being recognized that there are some circumstances, not involved here, such as estoppel on the part of a vendor, which constitute exceptions. No such circumstances appear here.

3. The trial court was obliged to conclude, and could not reasonably have found otherwise that appellant took no more title from Joseph Roberts and Albert Pauls than they had, which was none.

4. The court could not have concluded otherwise than that Beatrice Nelson acquired no insurable interest, buying from persons without ownership, while on notice. As to the $2000.00 she paid, she was simply defrauded by Roberts and Pauls, and is in no better position with respect to an insurable interest from being so defrauded than she would have been by direct theft of the sum from her purse.

5. There was no error in the judgment, which is fully supported in the evidence.

6. The findings and conclusions were proper, as above shown in detail.

7. The question of relevance of the evidence received is not before this court, being waived by failure to object, waived by introduction of evidence on the same lines, as above shown, and waived by failure to conform on the appeal with Rules 18 (d) and 20.

8. The trial court correctly upheld the defense that a person buying from such as Roberts and Pauls acquired no insurable interest.

In conclusion, appellee desires to call attention to the fact that appellant has, repeatedly, throughout her brief, referred to the position of appellee as one which would create a "windfall" to appellee. How the appellant comes to this conclusion is beyond the comprehension of appellee. The appellee has tendered to the appellant the gross amount of the premium paid. Had appellee not done so, the situation might be different though, of course, such a position would be untenable.

Further, should the appellant prevail in her contention, it would establish a situation in Idaho which would legally condone a thief or embezzler, either acting in consort with an accomplice or independently, in selling stolen or embezzled personal property to

anyone, particularly to an accomplice, who could then insure such personal property and deliberately cause its destruction and then collect on the policy of insurance. If the vernacular "fence" may be used for a person who deals in the disposition of stolen goods, the position of the appellant would be - to use the wording of the appellant - a "windfall" to those who steal or embezzle and Idaho would become their "Happy Hunting Ground."

Respectfully submitted,

J. F. MARTIN
C. BEN MARTIN

By C. Ben Martin
Attorneys for Appellee
Residence: Boise, Idaho

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Reply Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

L. CHARLES JOHNSON
GEORGE R. PHILLIPS
Residence: Pocatello, Idaho
Attorneys for Appellant

FILED
SEP 13 1958
PAUL P. O'BRIEN, Cl

GATEWAY PRINTERS—POCATELLO

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Reply Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

L. CHARLES JOHNSON
GEORGE R. PHILLIPS
Residence: Pocatello, Idaho
Attorneys for Appellant

SUBJECT INDEX

	Page
Reply to Preliminary Objection to Review	1
Reply to discussion seriatim by appellee to specifications of error	2-9
Idaho conversion law and insurance protection	2-3
Obligation of contract the fundamental law	3-5
Apparent authority or estoppl in Pais	5-7
Purchaser for value can, without acquiring title, protect against loss by fire	7-9

TABLE OF AUTHORITIES

Cases	Page
Dissault vs. Evans, 24 Ida. 295, 261 P2d 822	7
Dumas vs. Bryan, 35 Ida. 557, 207 Pac. 720	3
Fidelity State Bank vs. North Fork H. Dist. 35 Ida. 797, 813, 209 Pac. 444	4
Klam vs. Koppel, 63 Ida. 171, 118 P2d 729	2
Mountain States Impl. Co., vs. Arave, 50 Ida. 557, 207 P2d 314	3
Occidental Life Ins. Co. vs. Thomas, 107 F 2d 8 N	2
Ringele vs. Terteling, 78 Ida. 431, 305 P2d 431	2
Sanderson vs. Salmon River Canal Co. Ltd. 45 Ida. 244, 257, 263 Pac. 32	4
Steward vs. Nelson, 54 Ida. 437, 37 P2d 843	4

STATUTES

Sec. 64-207, Idaho Code 5

CONSTITUTION

Article I Section 16, Constitution of the State of Idaho .. 4

LITERATURE

American Bar Association Journal, September, 1958,
Vol. 44 No. 9, page 850 5

No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Reply Brief of Appellant

ARGUMENT

The preliminary objection to review which is contained in the Brief of Appellee we submit to be inappropriate and without foundation in law. There is no rule, to our knowledge, requiring a party after the Court makes findings and renders unfavorable judgment to file proposed findings of fact or proposed conclusions of law, or proposed judgment. This would be inconsistent with the simplicity sought in Federal rules. The authorities cited by appellee are inappropriate for the contention sought in the preliminary objection.

In the seriatim reply by appellee to specifications of error, attention is called to the case cited by appellee on page 3 of its brief.

> Occidental Life Ins. Co. vs. Thomas, 107 Fed. (2) 876.

This case reiterates the oft repeated rule that the trial court's findings are not to be disturbed on appeal unless clearly erroneous. The Brief of Appellant filed herein is replete in showing that the findings of the trial court were clearly erroneous and based on a misapprehension of Idaho Law.

Appellee, on page 4 and following in its brief notes the statement that one who purchases property must at his peril ascertain the title and right of vendor to sell. Idaho has indeed gone much further than other states in imposing a "conversion."

> Klam vs. Koppel, 63 Ida. 171, 118 Pac. (2) 729.

In addition to the cases and authorities cited by appellee, the Idaho Court went further in Ringele vs. Terteling, 78 Ida. 431, 305 P2d 431, in which a party was liable in conversion although ignorant of the title rights at the time the property was taken. The question then simply is this: Is not an insured entitled to protection under an insurance contract when such insured might have acquired property for which insured is responsible to the true owner for its value, especially when destruction of the property would most cer-

tainly bring about conversion under Idaho law? It is exactly because of the existence of liability in conversion (which in effect is a forced sale on an innocent purchaser) that the insurance contract should be looked to for protection by purchasers of property in Idaho. When, therefore, property is destroyed by fire, the purchaser for value will not be left without protection when he is called on to answer to a true owner.

In an extension of this same point, might we call the attention of this Court to the language on page 10 of the brief of appellee. First, the bland statement that the interest of a purchaser is not insurable is not supported in any way by the authorities cited. Mountain States Impl. Co. vs. Arave, 50 Ida. 557, 207 Pac. (2) 314, cited therein by appellee, concerns itself with an order of a court and judgment and does not discuss at all insurable interest. Similarly with Dumas vs. Bryan, 35 Ida. 557, 207 Pac. 720. But one's attention is caught by the language in the Dumas case:

> "It is held by all of the authorities that an unconstitional law is in logical effect no more than a blank page, and therefore the question of its validity or of any rights sought to be exercised under it, is never waived but may always be raised at any stage of the proceeding . . ."

Not ony the Federal Constitution, but the Idaho Constitution, expressly adopts the theory of sacredness of contractual obligation.

"No . . . law impairing the obligation of contracts shall ever be passed."

Art. I, Sec. 16, Constitution of the State of Idaho.

That great jurist, Judge Budge, when sitting on our high court in Idaho, had several occasions to pass on this section.

"The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with conditions . . . or lessens any part of the contract obligation or substantially defeats its ends."

Fidelity State Bank vs. North Fork H. Dist., 35 Ida. 797, 813, 209 Pac. 444.

"Any enactment of a legislative character is said to 'impair the obligation of a contract which attempts to take from a party a right to which he is entitled by its terms, or which deprives him of the means of enforcing such a right.' (12 C. J. p. 1056, Sec. 699)."

Sanderson vs. Salmon River Canal Co., Ltd. 45 Ida. 244, 257, 263 Pac. 32.

See Steward vs. Nelson, 54 Ida. 437, 32 P. (2) 843.

We submit if the statute defining insurable interest in-

terferes in the obligation of appellee to pay it is under Idaho law unconstitutional.

Commencing in the middle of page 5 and continuing on into brief of appellee, a distinction is made on the doctrine of apparent authority and also on sales transaction being void or voidable. To properly analyze the cases, one must distinguish between the rights of a seller or vendor failing to deliver a title certificate as distinguished from the rights of a purchaser for value failing to receive a title certificate. The two must be clearly distinguished or the perspective in the case is missed. Once the distinction is borne in mind, the position of appellee is seen to fall.

Authority of the agent to sale, whether implied or apparent, or derived from an estoppel, cannot be denied, when an agent is given possession of property and indicia of ownership. Reading the authorities indicate this. Estoppel in pais must be considered. As was recently stated in a well known legal publication:

> "So here, at least, all the splits of authority are fusses over nothing, because the result is the same, or, at least, should be the same."
>
> American Bar Association Journal, Vol. 44, No. 9, p. 850.

The appellee on Page 4 of its brief fails to quote the entire section leaving out the apparent authority and other exceptions. Sec. 64-207, Idaho Code, reads:

"Transfer of title—Sale by a person not the owner—

1. Subject to the provisions of this law, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

2. Nothing in this law, however, shall affect:

a. The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

b. The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction."

As to the statement that the only basis that Roberts and Pauls had authority to sell was their own statement to that effect, we submit in addition that the most important criterion, "possession," was present in Roberts, which included not only actual possession of the property itself, but also the papers which attended the transaction. Further, the record shows, without doubt, that under certain conditions Roberts had actual authority to sell (R. 117 R. 76).

As to Point 5 on Page 6, not only did Roberts have

authority to sell, but we submit that under the trite and well-known law appellant under any contention acquired an interest in the trailer house which was good as against the whole world except the true owner.

Of course, the statement on page 7 is not in order as Roberts had indicia of ownership.

On page 13 we find this statement:

> "We are forced back to the initial premises that one who has no more right or title than a thief cannot pass any more right or title than a thief, and his attempt to do so produces no insurable interest."

Again the smoke screen is raised, and, contrary to the implication of appellee, except for a small number of minority states, we know of no cases where a purchaser for value cannot protect himself against certain risks, such as fire, by insuring the property of which he has possession.

We further submit that the appellee misreads Dissault vs. Evans, 74 Ida. 295, 261 P. (2) 822. On page 21, appellee states it is futile to find the solution to the Idaho statutory problem in the decisions in other states. We submit, that Idaho has spoken clearly and that until the factual situation such as is now before this court has been considered by the Idaho Supreme Court, the liberality favoring the insured and binding the insurer to its contract should be the lamp post which lights the way for a decision of the instant cause. Such light, without doubt, under the Idaho law,

shows appellant is entitled to recovery.

We submit, the evidence without doubt, discloses Beatrice Nelson to be a purchaser for value. Further, although as stated by appellee on page 26 of its brief, the trial court concluded that in the state of Idaho a certificate of title is a condition precedent to acquiring an interest in a trailer home, we submit such is not the law in the State of Idaho and in Idaho insurable interest has never been held lacking because of title deficiency.

One is intrigued indeed by the statements and arguments contained on page 8 of the brief of appellee. Certainly, the appellant stated all circumstances affecting the risk—we emphasize "affecting the risk." This brings up the constant feature of this lawsuit, that title has nothing to do with risk. A purchaser for value has always been held to have an insurable interest covering property which was purchased.

One is impressed throughout the record with the collateral attack made by the insurance company as to title when no direct attack was or has been made by the alleged true owner. We discussed this title question in our original brief. In Idaho, under the equities of the matter, appellant became the actual owner. This leaves the question before this Court: Can a collateral defense be raised by an insurer as to the title in property when the insured has a title which has either withstood attack from outside title claimant or produced no attack by an outside title claimant?

Appellee pays special detail to the insurable interest ques-

tion. We feel that further statements beyond our original brief would be redundant. The insured, appellant here, certainly was not an embezzeler. Appellee again, as in the trial court, forces before this court a smoke screen as if this were a suit by adverse title claimants. This is a claim by appellant on a contract. The contract was one for insurance, and appellant asks nothing more, having fulfilled the contract on her part by payment of the premium, that the insurer, appellee here, perform its part of the contract by payment after loss.

Otherwise, as suggested in our earlier brief, an unearned windfall gain and unjust enrichment goes to appellee, while appellant suffers an unnecessary and tragic windfall loss.

Respectfully submitted,

L. Charles Johnson
George R. Phillips
Attorneys for Appellant
Residence: Pocatello, Idaho

No. 16000

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND JOHN WAGNER, ANTHONY JOSEPH CAMBIANO and DONALD VANDERGRIFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

FILED

NOV 24 1958

PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Statement of the case 1

The robbery, briefly summarized 1

Identification summarized 4

Brief account of certain other witnesses 4

II.

No errors were committed by the entire court's order refusing to reveal the names or addresses of jurors. Nor of the trial court's ruling in similar respect. Nor of the court's ruling with respect to individual examinations of prospective jurors 8

Further discussion 10

III.

The evidence was fully sufficient to support the verdict 11

Puts his life in jeopardy by the use of a dangerous weapon 13

The Donovan case 15

IV.

No error was committed in the court's denial of a bill of particulars, requesting the names and addressses of Government's proposed witnesses 16

Equally available 17

The rule that applies 20

The denial of the names of witnesses sought by a bill of particulars was discretionary and properly denied 22

V.

No reversible error was committed in the admission or exclusion of evidence 23

A. The telephone records reflecting message unit calls from Vandergrift's phone number to Cambianos were relevant and properly admitted 23

PAGE

B. No error was committed in the cross-examination of the defendant Wagner 25

C. No error was permitted in the court permitting the Government to reopen its case and produce the testimony of Inspector Hudson 28

VI.

No error was committed in refusing the admittance of Exhibit E, the so-called police record. Its contents were freely permitted and used in the cross-examination of the identifying witnesses 30

The equivalent in descriptions as to that contained in the so-called police record was presented to the jury through cross-examination of identifying witnesses and through defense witnesses 33

VII.

No error existed in the denial of the post office inspectors' reports 35

VIII.

No reversible error occurred in the giving or refusal of instructions 39

IX.

No error was committed in denial of defendants' motion for judgment of acquittal..... 44

Conclusion 48

TABLE OF AUTHORITIES CITED

CASES PAGE

Austin v. United States, 4 F. 2d 774 26, 29
Barone v. United States, 205 F. 2d 909 12
Bell v. United States, 251 F. 2d 490 45
Bernstein v. United States, 234 F. 2d 475, cert. den. 352 U. S. 915 41
Berra v. United States, 221 F. 2d 590 27
Bianchi v. United States, 219 F. 2d 182, cert. den. 349 U. S. 915 42
Blakslee v. United States, 32 F. 2d 15 24
Bram v. United States, 226 F. 2d 858 24, 25
Brink v. United States, 60 F. 2d 231 25
Burke v. United States, 58 F. 2d 739 29
Caudill v. Victory Carriers, 149 Fed. Supp. 11 31
Colbeck v. United States, 10 F. 2d 401 15
Curley v. United States, 160 F. 2d 229, cert. den. 331 U. S. 837 46
D'Aquino v. United States, 192 F. 2d 338 27
Davis v. United States, 229 F. 2d 181 27
Duncan v. United States, 197 F. 2d 935 24
Ehrlich v. United States, 238 F. 2d 481 43
Elwert v. United States, 231 F. 2d 928 45
Finn v. United States, 219 F. 2d 894, cert. den. 249 U. S. 906 39
Finnegan v. United States, 204 F. 2d 105 12
Fite v. State, 158 Tex. Crim. 611, 259 S. W. 2d 198 32
Frederick v. United States, 163 F. 2d 536 22
Gage v. United States, 167 F. 2d 122 12
Gencarella v. Fyfe, 171 F. 2d 419 31
Glasser v. United States, 315 U. S. 60 12
Goldman v. United States, 245 U. S. 474 12
Gordon case, 344 U. S. 414 37
Gorin v. United States, 111 F. 2d 712, aff'd 312 U. S. 19 45
Gormely v. United States, 167 F. 2d 454 28

PAGE

Hamer v. United States (No. 15688), ... F. 2d (Aug. 26, 1958) rehear. den. 9, 10

Harris v. United States, ... F. 2d. (June 24, 1958), rehear. den. Nov. 6, 1958, ... F. 2d 38

Hartzog v. United States, 217 F. 2d 706 33

Hemphill v. United States, 120 F. 2d 115, cert. den. 314 U. S. 627 45

Herzog v. United States, 235 F. 2d 664 39

Himmelfarb v. United States, 175 F. 2d 924 22

Hoffman v. Palmer, 129 F. 2d 976, aff'd 318 U. S. 109 33

Jencks case, 353 U. S. 657 35, 37, 38

Jianole v. United States, 299 Fed. 496 29

Kasper v. United States, 225 F. 2d 275 43

Labiosa v. Government of the Canal Zone, 198 F. 2d 282 29

Las Vegas Merchants Plumbers Association v. United States, 210 F. 2d 732 39

Lemke v. United States, 211 F. 2d 73, cert. den. 347 U. S. 1013 43

Lutch v. United States, 73 F. 2d 840 28

Lutwak v. United States, 344 U. S. 604 42

Madigan v. United States, 23 F. 2d 180 14, 16, 40

Malone v. United States, 238 F. 2d 851 47

McClanahan v. United States, 230 F. 2d 919 20

Medina v. United States, 254 F. 2d 228 28

Mullican v. United States, 252 F. 2d 398 33

Murray v. United States, 10 F. 2d 409 15

Nye and Nissen v. United States, 168 F. 2d 846, aff'd 336 U. S. 613 22

O'Brien v. United States, 25 F. 2d 90 15

Olender v. United States, 210 F. 2d 795 32

Owens v. United States, 174 F. 2d 469 33

Pasadena Research Lab. v. United States, 169 F. 2d 375 12

People v. Braun, 92 P. 2d 402, 14 Cal. 2d 1 13, 48

People v. Coleman, 53 Cal. App. 2d 18, 127 P. 2d 309 40

PAGE

People v. Gardiner, 128 Cal. App. 2d 1, 274 P. 2d 908 48
People v. McKinney, 111 Cal. App. 2d 690, 245 P. 2d 24 40
People v. Raner, 86 Cal. App. 2d 107, 194 P. 2d 37 40
People v. Thompson, 147 Cal. App. 2d 543, 305 P. 2d 274 48
People v. Vacarella, 61 Cal. App. 119 25
People v. Walker, 154 A. C. A. 175, 315 P. 2d 740 48
People v. Ward, 84 Cal. App. 357, 190 P. 2d 972 40
Powers v. United States, 223 U. S. 303 27
Raffel v. United States, 271 U. S. 494 26
Randel v. State, 153 Tex. Crim. 282, 219 S. W. 2d 689 32
Rattley v. Irelan, 197 F. 2d 585 10
Reamer case, 229 F. 2d 884 46, 47
Rios v. United States, 256 F. 2d 173 38
Ross v. United States, 197 F. 2d 660 46
Roviaro case, 353 U. S. 53 38
Salerno v. United States, 61 F. 2d 419 28
Samish v. United States, 223 F. 2d 358 39
Shaw v. United States, 244 F. 2d 930 41
Shurman v. United States, 233 F. 2d 272 20
Smith v. United States, 230 F. 2d 935 21
Stillman v. United States, 177 F. 2d 607 13, 22
Stone case, 223 F. 2d 23 46
Taylor v. United States, 142 F. 2d 808, cert. den. 323 U. S. 723 39
Thompson v. United States, 233 F. 2d 317 47
United States v. Angelo, 153 F. 2d 247 41
United States v. Brennan, 134 Fed. Supp. 42 22
United States v. Brown, 236 F. 2d 403 20
United States v. Buckner, 108 F. 2d 921 27
United States v. Di Carlo, 64 F. 2d 15 42
United States v. Donovan, 242 F. 2d 61 15, 16
United States v. General Petroleum Corp., et al., 33 Fed. Supp. 95 22
United States v. Gordon, 253 F. 2d 177 21

PAGE

United States v. Grayson, 166 F. 2d 863 33
United States v. Jackson, 257 F. 2d 41 18, 19, 21
United States v. Kushner, 135 F. 2d 668, cert. den. 320 U. S. 212 41
United States v. La Rocca, 224 F. 2d 859 20
United States v. Lavery, 161 Fed. Supp. 283 22
United States v. Lebron, 222 F. 2d 531 22
United States v. Lowe, 234 F. 2d 919 26
United States v. Radov, 44 F. 2d 155 24
United States v. Schennault, 201 F. 2d 1, cert. den. 345 U. S. 950 10
United States v. Schneiderman, 106 Fed. Supp. 906 9
United States v. Seeman, 115 F. 2d 371 42
United States v. Socony-Vacuum Oil Co., Inc., 310 U. S. 150 .. 12
Wayne v. United States, 138 F. 2d 1, cert. den. 320 U. S. 800 22
Wong Tai v. United States, 273 U. S. 77 22
Yaw v. United States, 228 F. 2d 382 21
Yung Jin Teng v. Dulles, 229 F. 2d 244 33

RULES

Federal Rules of Criminal Procedure, Rule 23 9
Federal Rules of Criminal Procedure, Rule 24(a) 9, 10
Federal Rules of Criminal Procedure, Rule 52(a) 35
Federal Rules of Criminal Procedure, Rule 57(b) 11
Federal Rules of Criminal Procedure, Title 18, Sec. 29(a) 45
Rules of the United States Court of Appeals, Ninth Circuit, Rule 18(2)(f) 30

STATUTES

United States Code, Title 18, Sec. 2 15
United States Code, Title 18, Sec. 2114 13
United States Code, Title 18, Sec. 3432 8, 22
United States Code, Title 18, Sec. 3500 38
United States Code, Title 28, Sec. 411 (1946 Ed.) 10

PAGE

United States Code, Title 28, Sec. 1732 30
United States Code, Title 28, Sec. 1861 10
United States Code, Title 28, Sec. 1864 10
United States Constitution, Sixth Amendment 9

MISCELLANEOUS

12 Cyclopedia of Federal Procedure (3rd Ed.), Sec. 48.135 28
12 Cyclopedia of Federal Procedure (3rd Ed.), Sec. 48.292 20
Notes of the Advisory Committee on Rules, Note (b) 11
1 Wharton's Criminal Evidence (12th Ed.) Sec. 250, p. 577 33
Wigmore on Evidence (3rd Ed.), Sec. 288 20
Wigmore on Evidence (3rd Ed.), Sec. 1635, p. 531 32
Witkin, California Evidence (1958), Secs. 290-291 33

No. 16000

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND JOHN WAGNER, ANTHONY JOSEPH CAMBIANO and DONALD VANDERGRIFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

Statement of the Case.

Appellee has no substantial difference with appellant's Statement of the Facts. One inadvertent error is noted on page 12, line 14, of Appellant's Brief where with reference to the witness Hunt it is stated, he, Hunt, had been sitting in the car from 10 to 11 o'clock. Hunt had testified that his car had been there since 10 or 11 o'clock, not that he had been sitting in it all that time.

The Robbery, Briefly Summarized.

On the afternoon of December 19, 1955, at about the hour of 2:30 P.M. Assistant Postmaster Bonner and Postmaster Martin left the Post Office at Bellflower to deposit postal funds and checks in a bank at Bellflower, California [R. 104]. They proceeded from the Post

Office in a Pontiac station wagon driven by Postmaster Martin. Martin was armed [R. 105]. They parked the station wagon in a parking lot to the rear of the bank. Immediately upon stopping the auto and when they, Bonner and Martin, started to get out of the car they were accosted; "a man accosted Martin with a gun . . ." [R. 106-107]. Bonner testified that he could not identify the man who accosted Martin with a gun [R. 107]. Postmaster Martin identified such person as the Appellant Vandergrift [R. 254-255]. Martin testified that this person, Vandergrift, ". . . approached on my side and stuck a gun in my side and demanded my gun" [R. 254]. That this person, Vandergrift, was also reaching in on the right side of Martin's coat trying to get his, Martin's, gun [R. 255]. "So (Martin) I reached into the left to give him my gun, and at that time he pushed the gun into my ribs and told me to keep my hand out if I didn't want to get shot" [R. 255]. Martin testified that he was apprehensive of his life and that he felt his assailant meant business [R. 255]. That his shirt had a rip in it where the gun had jammed into his ribs [R. 256].

Bonner testified that the man on his side of the auto also had a gun [R. 107]. That this person demanded the money. This person, Bonner identified as the defendant Wagner [R. 108]. Bonner testified that he was certainly apprehensive of his life and was in fear when the gun was pointed at him and that he believed the men meant business [R. 109]. Bonner testified that the "man," "Wagner," took the money, that the two of them went to the rear of their car and then later came in front of their car, crossed the street and got in the get-away car that was double parked across the street on Maple Street, headed east [R. 109]. This car was described as a dirty-colored Oldsmobile. Assistant Post-

master Bonner stated he saw the driver of the get-away car very clearly, whom he identified as the appellant Cambiano [R. 110]. Postmaster Martin likewise identified Cambiano as the driver of the get-away car [R. 259-260].

Witness Bonner stated that there was a "7-up" truck double parked on the street at the time they (he and Martin) went into the parking lot [R. 149]. That he later talked to the driver of this truck [R. 150]. That the "7-up" man gave to him, Bonner, the license number of the get-away car [R. 178].

The Witness Robert Hunt stated that he was an insurance agent. That on December 19, 1955, he had parked his automobile on Maple Street [R. 226]. This car was parked on the opposite side of the street from Mr. Hunt's office. That he had gone to his car that afternoon and attempted to start his car when a man with a money sack or a brown canvas bag in one hand and a gun in the other appeared to the right of his car [R. 227]. Witness Hunt identified this person as the defendant Vandergrift [R. 228]. That this person was close to him, about four or five feet—that he had blue eyes [R. 229]. Hunt described the get-away car as a "'50, '51, oxidized, badly oxidized Oldsmobile, four-door sedan" [R. 229]. Hunt observed the driver of this car and identified him as appellant Cambiano [R. 230]. Upon cross-examination, he again identified Canbiano and gave a description of him as he remembered him [R. 242]. The witness Hunt conceded that his identification of Vandergrift was "doubtful" [R. 238]. Hunt made no attempt to identify appellant Wagner; he testified: "Another man crossed behind the first man, which I did not get a good look at" [R. 230].

Postmaster Martin identified Vandergrift as the person who approached his side of the car ". . . and stuck a gun in my side and demanded my gun" [R. 254-255]. Martin also identified Wagner as the person he observed on the opposite side of the car. ". . . I glanced over to my Assistant Postmaster and I noticed that another man was over there with a gun at his head" [R. 257]. That this person did not then have a mask on [R. 257]. Witness Bonner had testified that the mask over a part of Wagner's face had slipped down [R. 140]. Witness Martin also identified Cambiano as the driver of the car that the robbers used to make their get-away [R. 260].

Identification Summarized.

Assistant Postmaster Bonner identified two of the defendants, *i.e.,* Wagner [R. 108] and Cambiano [R. 110].

Postmaster Martin identified all of the defendants. Vandergrift [R. 255], Wagner [R. 257] and Cambiano [R. 260].

Witness Robert Hunt identified Vandergrift [R. 228] but later conceded this to be a doubtful identification [R. 238]. He identified Cambiano as the driver of the Oldsmobile [R. 242].

Brief Account of Certain Other Witnesses.

Witness Francis L. Smongesky was called by the defense. He was a latent fingerprint expert from the Sheriff's Office [R. 381]. He was called to examine certain cars on the afternoon of December 19, 1955. He examined the Pontiac station wagon (the car driven by Postmaster Martin to the parking lot to the rear of the bank), his notes failed to reveal the lifting of any fingerprints from the station wagon [R. 385], although he said he did lift some fingerprints from it [R. 385-386].

Witness Smongesky testified that he checked a car at the Los Cerritos Municipal Court [R. 387-388] bearing license 2 U 72729. This was the so-called "get-away" Oldsmobile. That he found a partial print on its steering wheel and "left front door arm rest of the Oldsmobile. I guess that's it." That he endeavored to make a comparison with Exhibit "F" to those that he lifted from the Oldsmobile. Exhibit "F" being the fingerprints of defendant Wagner, Vandergrift and Cambiano. That the comparison ". . . was negative." Upon cross-examination, expert Smongesky stated that if the back of one's hand were to rub against a car or table it would leave no prints; that fingerprints are very fragile and easily destroyed [R. 392]. That he had examined the car, all of its surfaces, including the left rear door handle or device:

> Q. And you found on both of these handles, the outside and inside, not one single trace of fingerprints, isn't that true? A. That is true [R. 395].

Witness Smongesky further stated, that from his experience that if a handle had been recently used, a print would be there, unless a person had a glove on [R. 395]. He further stated that he examined the steering wheel thoroughly and in his opinion if a print had been placed there within the hour or prior and had not been removed he would anticipate finding some traces of fingerprints or parts thereof on the steering wheel [R. 397-398].

The witness Bertha Burk stated that she rented some property at 327 North Gower Street, in the Hollywood area, to Mrs. Cambiano and Mr. Cambiano in the fall of 1955. Witness Burk identified such persons [R. 320]. That they had given the names of Fred and Frieda Burnell. This testimony was admitted only as to Cambiano [R. 321].

Witness Estelline Woodward testified that she had rented an apartment located at 10644 Wilshire Boulevard, Apartment 5, in October, 1955, to the defendant Vandergrift [R. 317]. That Vandergrift and his son continued to occupy this apartment during the months of November and December, 1955 [R. 318]. This witness identified defendant Vandergrift [R. 319].

Grace Begando stated she was employed by the General Telephone Company. That such company maintained service in the year 1955 to 10644 Wilshire Boulevard (the address of defendant Vandergrift's then apartment). The witness produced records from this telephone company Exhibit 10 being an application for telephone service of November 1, 1955, at 10644 Wilshire Boulevard, phone number GR 7-4148, and Exhibit 11 a detailed statement of calls made from this number relevant to message unit calls, the date, time, number of message units and the number called. These were offered as to Vandergrift and Cambiano, not as to Wagner [R. 329-331]. The witness had testified that both of these records were kept in the regular course of business by the General Telephone Company. The witness then proceeded to examine the various calls made from Vandergrift's apartment to a Hollywood 30325 number as reflected on Exhibit 11. (This last number was Cambiano's number, of 327 North Gower.) Witness stated the first call noted, made to HO 3-0325 was of December 12, 1955. An examination of Exhibit 11, the phone message unit statement, will indicate that there was made from GR 7-4148 (Vandergrift's) to HO 3-0325 (Canbiano's) sixteen calls from December 12, 1955, to and including December 18, 1955. Four such calls were made on December 17, 1955, and three on December 18, 1955. The robbery was Decem-

ber 19, 1955. Witness Begando stated no record was kept of incoming calls unless they were collect calls, of which there would be a record if such were made [R. 333].

Witness Byron C. King appeared as a representative of the Pacific Telephone and Telegraph Co. [R. 324]. He produced Exhibits 9 and 9-A, *i.e.,* company records of a subscriber in the name of Fred Burnell, whose phone he stated was installed in the month on September, 1955, at the address indicated, and that the phone number was Hollywood 3-0325 [R. 326]. That this number was a "non-published" number, which meant the subscriber's name was not listed in any telephone directory, nor is it given out by the telephone company [R. 327].

The defense called Charles H. Purdom, an elderly man who conducted a barber shop across the street from the site of the robbery. He testified to seeing a fellow running across the street with a hat on who went up to the station wagon ". . . and opened the door and went to working in there with his hands" [R. 341]. That the men he saw had hats on and the one he saw had something over his face [R. 342]. He did not identify any of the defendants [R. 343]. Upon cross-examination, witness Purdom stated that if there was a man driving the car in which they went away he never saw him [R. 349]. That he never saw the face of the man that was coming toward him. That he would not attempt to identify that man [R. 350]. That he did not see the man sufficiently so he could have told anybody who he was [R. 351]. That two men came to see him from the Sheriff's Office the day after the robbery [R. 353]. He was questioned and answered as follows:

> "Q. (By Mr. Neukom): And didn't you tell Lt. Le Bas, in substance and effect, that you didn't see anything regarding the robbery, and that there

would be no need for them to make any notes as you had not seen anything about it, or words to that effect? A. Well, that is what I thought, that it didn't amount to enough as a witness. But other people sees different.

Q. Did you tell them substantially what I said? A. Yes, sir."

II.

No Errors Were Committed by the Entire Court's Order Refusing to Reveal the Names or Addresses of Jurors. Nor of the Trial Court's Ruling in Similar Respect. Nor of the Court's Ruling With Respect to Individual Examinations of Prospective Jurors.

It is submitted that no Constitutional right of the defendants was infringed upon by the general order of this district court filed February 28, 1951, with respect to jurors nor by the instant rulings of the trial court now complained of by appellants.

With the exception of capital cases such as treason and murder (18 U. S. C., Sec. 3432), we know of no rule or provision requiring the clerk or the court to divulge prior to trial the names of prospective jurors.

In fact, the law would seem to be that it is improper to make such divulgement. Prospective jurors should not be subject to neighborhood interview, etc. It is well established by reason of the Professional Ethics of the American Bar Association and by respectable authorities, that jurors should not be subjected to inquiry after they have arrived at their verdict. If it be the rule that jurors should not be harassed and investigated after the return of their verdict, all the more so should no investigation be conducted prior to their service. For a discussion and collec-

tion of authorities on the subject of the impropriety of investigating jurors, subsequent to verdict, see those collected and discussed by Judge Mathes in *United States v. Schneiderman,* 106 Fed. Supp. 906, 925 (1952).

There is no violation of the Constitutional guaranty in the rule of this court in refusing to furnish information on prospective jurors. The Sixth Amendment guarantees in criminal cases:

> ". . . to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

This does not require the providing of the names and addresses of prospective jurors. There is a presumption that jurors called are fair jurors and will decide a case upon the evidence and instructions of the court. Rule 23, Federal Rules of Criminal Procedure, makes no provision for the supplying of the names and addresses of prospective jurors.

The rule that applies is Rule 24(a) of the Federal Rules of Criminal Procedure. The rule has never, to our knowledge, been held to be unconstitutional.

Appellants have discussed this jury issue under their first four main "Points" or headings. We shall refer to such contentions under this one heading.

It is appellee's view that substantially all of such contentions here urged have been answered by a recent opinion of this court, and one which is quite familiar to counsel for appellants. Such case is:

> *Hamer v. United States* (No. 15688),..... F. 2d (Aug. 26, 1958), rehear. den.

We shall not repeat the arguments or authorities the government presented in its brief in the *Hamer* case, nor

here refer to the cases and comments of this court in the *Hamer* opinion. We submit these jury contentions on *Hamer.*

Further Discussion.

Reference by the appellant to 28 United States Code, Section 1864, as a guarantee of the right to know the names and addresses of jurors is not supported by the language of that statute. That section declares that the names of petit jurors shall be publicly drawn. It does not state that the names and addresses of prospective jurors are a matter of public record available to anyone. While the drawing of names is public, the names themselves are not public.

Appellants state (see App. Op. Br. pp. 34-35) that prior to 1946 jurors were selected in accordance with the usual and customary practice within the state, 28 United States Code, Section 411 (1946 Ed.).

In 1948, Congress enacted standard of qualifications for jurors in Federal courts, 28 United States Code, Section 1861. This section was later changed in September of 1957. Criminal cases in the Federal courts are governed and controlled by Federal statutes and Federal decisions and state decisions and statutes are inapplicable.

> *United States v. Schennault,* 201 F. 2d 1, 3 (C. A. 7, 1952), cert. den. 345 U. S. 950.

Rule 24(a) with reference to examination of prospective jurors makes it discretionary with the court to conduct *voir dire* examination itself or permit interrogation by counsel. A Federal rule of criminal procedure has the force of a statute and hence will abrogate a contrary principle of common law.

> *Rattley v. Irelan,* 197 F. 2d 585, 586 (C. A. D. C., 1952.)

Another interesting aspect is presented by Rule 57(b), Federal Rules of Criminal Procedure, which states:

> "If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

The Notes of the Advisory Committee on Rules, Note (b), states:

> "One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever."
>
> ". . . it semed best not . . . to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them either by local rules or usage. Among such matters are the mode of impaneling a jury . . ."

III.

The Evidence Was Fully Sufficient to Support the Verdict.

Commencing at page 36 of Appellants' Opening Brief, the evidence is challenged as insufficient. At a later part of this brief under our heading number IX, where we discussed the propriety of the court denial of a judgment of acquittal, we have referred to the evidence and its sufficiency.

A familiar principle followed by reviewing courts is that appellate courts will consider the evidence most favorable to the prosecution in determining whether the evidence is sufficient to sustain a conviction. Matters of identity, any conflict, alibis, absence of corroboration, length of time elapsing for an observation of appellants, and even lack of fingerprints in the get-away car, are all jury questions.

The appellate court must assume the jury resolved all conflicts in favor of the appellee and must assume the evidence proved all facts which it reasonably tended to prove.

Barone v. United States, 205 F. 2d 909, 912 (C. A. 8, 1953);

Finnegan v. United States, 204 F. 2d 105, 114 (C. A. 8, 1953).

Cases following this well established rule that the credibility of witnesses and the weight of the evidence are to be determined by the trier of facts are legion, to note but a few:

Goldman v. United States, 245 U. S. 474, 477 (1918);

Gage v. United States, 167 F. 2d 122, 124 (C. A. 9, 1948);

Pasadena Research Lab. v. United States, 169 F. 2d 375, 380 (C. A. 9, 1948);

United States v. Socony Vacuum Oil Co., Inc., 310 U. S. 150, 254 (C. A. 7).

Glasser v. United States, 315 U. S. 60, 80 (C. A. 7) as follows:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. United States v. Manton, 107 F. 2d 834, 839, and cases cited."

We submit that the evidence which the jury believed not only amply supports, but in fact compels the verdict which the jury returned. The rule as stated in this Circuit is

noted in *Stillman v. United States,* 177 F. 2d 607 (C. A. 9, 1949) at 616:

> ". . . The jury weighed the evidence and accepted it as true beyond a reasonable doubt, and since it is supported by sufficient evidence, the verdict binds us. *Hemphill v. United States,* 120 F. 2d 115 (C. A. 9), cer. den. 314 U. S. 627, 62 S. Ct. 111, 86 L. Ed. 503; *Henderson v. United States,* 143 F. 2d 681 (C. A. 9)."

The identity must be so weak as to constitute practically no evidence at all to entitle a reviewing court to set aside a jury's verdict. *People v. Braun,* 92 P. 2d 402, 404, 14 Cal. 2d 1. The *Braun* case was for the offense of robbery.

Puts His Life in Jeopardy by the Use of a Dangerous Weapon.

Appellants argue that something more must be established besides the occurrence of the robbery with the use of guns to come within the language of the statute which increases the offense, *i.e.,* ". . . or puts his life in jeopardy by the use of a dangerous weapon, . . ." (18 U. S. C., Sec. 2114). The evidence is clear in this case that both Wagner and Vandergrift were armed with guns, loaded or otherwise is not material. The argument appellants advance is most tenuous. Surely they do not assert that a shot must first be fired or the guns used by striking a blow before this phase of the statute would apply. "Put in jeopardy" could hardly have been intended by Congress to require some physical attack, a pulled trigger, a smashed head. We must be realistic and practical. Robbery is no new crime.

This case was tried under the authority of the *Madigan* case, *infra,* and cases therein cited. In *Madigan,* the then Federal statute contained the same clause ". . . or puts his life in jeopardy by the use of a dangerous weapon, . . ." The California law pertaining to robbery, and what constitutes a dangerous weapon was also presented in the instant case.

In *Madigan v. United States,* 23 F. 2d 180, 182 (C. A. 8, 1927) the court quoted from instructions given in previous Federal robbery cases (p. 182):

> " 'If, therefore, you shall believe that a robbery of the mail has been committed by the prisoner; and that in effecting if he has done such acts as created in the mind of the driver a well grounded apprehension of danger to his life, in case of resistance or refusing to give up the mail; if his life was actually in danger, or he really believed it to be so, then the robbery was committed by putting his life in jeopardy." '

The appellate court then continued:

> "This principle was restated by Judge Maxey in charging the jury in United States v. Reeves (C. C.) 38 F. 404. We are impressed with the soundness of this construction of the statute. The trial court took this view of the law and instructed the jury:
>
> " 'Putting the life of a custodian of the mail in jeopardy is effected when a demand for submission and surrender of the mail is made of the person in charge thereof with a show of weapons calculated to take his life, such as pistols, thereby putting him in fear of his life.' "

It is well settled by California law as well as by Federal law that a person may be convicted of robbery with deadly weapons, when weapons were used by the actual robbers

though one of the accused was not present at the actual robbery.

Murray v. United States, 10 F. 2d 409, 411 (C. A. 7, 1925);

18 U. S. C., Sec. 2.

To like effect pertaining to mail robbery:

O'Brien v. United States, 25 F. 2d 90, 91 (C. A. 7, 1928);

Colbeck v. United States, 10 F. 2d 401, 403 (C. A. 7, 1926).

If a confederate may be found guilty of robbery with deadly weapons when not actually at the scene of the robbery, by what reasoning can it be argued that "put in jeopardy" means some kind of physical attack?

The Donovan Case.

Appellants have in their brief upon three occasions referred to the mail robbery case of *United States v. Donovan,* 242 F. 2d 61 (C. A. 2, 1957). In the opinion the court reviews the older cases brought under this or similar sections and concludes that "jeopardy" means danger not fear. That is precisely the way the trial judge so instructed in the instant case. Note the instruction given in this case.

> "Putting the life of a custodian of government money and property in jeopardy is effected when the accused or either of them has done such acts as has created in the mind of the postal official a well grounded apprehension of *danger to his life,* in case . . ." [R. 673]. (Emphasis added.)

The court was careful to explain that if the defendants are not guilty of robbery then it would be unnecessary to

find on the issue of the use of a dangerous weapon [R. 673]. At no point did he instruct as to fear—rather as to "danger to his life."

In *Donovan* the court refers to *Madigan & Reeves,* other mail robbery cases, with no apparent effort to criticize such authorities. *Donovan* is not adverse to the instant case; it affirmed the conviction with an observation by the appellate court that the sentence of 25 years was not mandatory and that the Probation Act could apply and a suspended sentence could be imposed on Count 2. The case was remanded for such reconsideration. In *Donovan* it is stated at page 64:

> "Moreover, on this record there appears to be no doubt of the actuality of the danger to the postal employee's life."

IV.

No Error Was Committed in the Court's Denial of a Bill of Particulars, Requesting the Names and Addresses of Government's Proposed Witnesses.

This subject particularly with reference to the "7-up" man is discussed commencing at page 40 of Appellants' Brief. To fairly consider this contention, attention is invited to the fact that this case was a re-trial of a previous trial that resulted in the jury failing to agree. The first trial commenced on July 31, 1956, and concluded on or about August 6, 1956. This trial—the subject of this appeal commenced on January 8, 1957, concluding with the verdict of guilt of January 16, 1957 [Clk. Tr. p. 49].

This we mention because not only was the "7-up" man, Mr. Hall, equally as accessible to the defense as to the prosecution but moreover his existence was made known to the defense in the former trial nearly five months before

the trial of the instant case. It is true that the transcript of the instant proceedings does not reflect such information, but if contested the Reporter's Transcript of the first trial will clearly show the existence of such a person—a driver of a "7-up" delivery truck whose whereabouts could surely have been found by the defense had they deemed his information of importance.

We hesitate to go out of the record of the instant case, however, during the former trial testimony concerning this so-called "7-up" man was referred to upon at least three occasions. Mr. James N. Bonner while testifying at the former trial described the truck driver—"but I think he had a shirt with 7-up on the back of it,"—The witness Mr. Hunt at the former trial also referred to seeing the parked "7-up" truck. The postmaster Mr. Martin at the former trial, with reference to the "7-up" truck testified that the driver of such truck was a "Mr. Hall" but that he only knew his last name.

It is thus apparent that the existence of the "7-up" truck driver was well known to the defense prior to the re-trial of this case, the subject of this appeal. Had the defense desired him, he could have been located.

Equally Available.

It is the position of the appellee that the "7-up" man was equally available to the defense; if so no inference should be drawn from the failure of the government to produce such a witness. No showing was made to the trial court that this person was peculiarly within the power of the appellee to produce and that the defense could not have found him if they had desired his presence. This is not the case of a special employee of the government not being called where the informer's presence was a natural

part of the government's case such as the situation presented in a case cited by appellants on page 42-a of their Opening Brief.

> *United States v. Jackson,* 257 F. 2d 41 (C. A. 3, 1958).

With reference to a failure to call the special employee the court observes on page 44 of the *Jackson* case:

> "His presence was a natural part of the Government's case and certainly he was not the kind of a witness that the defendant could be expected to call. We think that clearly his absence was a subject of proper and vigorous comment on the part of defense counsel."

In the *Jackson* case a prosecutor's objection to counsel for the defense comment upon the fact that the government did not call a certain witness was sustained by the trial court.

Not so here. Mr. Lavine, counsel for appellant Wagner developed the subject of the "7-up" man's absence without any objection by the prosecution, among other things, and freely and fully he argued to the jury [R. 611]:

> "Now, there is one missing witness here. The burden is on the Government to produce and prove its case. It is not on the part of the defense. There was a 7-up man there, a man who sat on the truck, a man who gave Mr. Bonner an automobile number which the Government now contends was the number of the automobile which they call the 'get-away car' and which Mr. Bonner says was the number that he didn't take and the number that he passed on to the officers.
>
> "Where is that 7-up man? Have you seen him? Why wasn't he here? The defense doesn't have to disprove our case. It is for the Government to prove

it. And I think it is significant that the United States didn't produce this 7-up driver as a witness. There has been no explanation as to why he wasn't here. It was up to them to maintain their burden of proof, and when they don't produce such a witness, it is presumed that his testimony would be against the Government.

"And I submit that when they didn't produce that 7-up man to come in here, his testimony would have been unfavorable to the Government, or they would have had him here. And so we have a hiatus in their proof."

Surely appellants must observe the distinction between this trial and that noted in the *Jackson* opinion.

A co-counsel for the defense, Mr. Ernest L. Graves, likewise referred to the absence of the "7-up" driver [R. 628]:

"But we don't have the 7-up driver, the one man who got the license. He is not brought in by the Government. And his evidence must be presumed to be against the Government. It must be presumed to be against it."

But that was not all; another co-counsel likewise referred to the absence of the "7-up" man, without a word of objection from the prosecution. We refer to Attorney Al Matthews, counsel for the defendant Cambiano [R. 642]:

"And that brings us to the 7-up man, doesn't it? Now, a wise judge said, 'A witness available to the prosecution to maintain the burden of proof which it does not produce or explain why it cannot, is presumed one who would testify against the Government. And the 7-up people aren't out of business yet that I known of."

The Rule That Applies.

Under circumstances such as presented in this case, the correct rule is, that where a witness is *equally available* to both parties no inference should be drawn from the failure to produce such witness.

Shurman v. United States, 233 F. 2d 272, 275 (C. A. 5, 1956);

United States v. La Rocca, 224 F. 2d 859 (C. A. 2, 1955);

McClanahan v. United States, 230 F. 2d 919, 925 (C. A. 5, 1956);

Wigmore on Evidence 3d Ed., Sec. 288;

Cyc. of Fed. Proc., Vol. 12, 3d Ed., Sec. 48.292.

There should be some showing that the adverse party made an effort to suppress admissible and relevant information.

United States v. Brown, 236 F. 2d 403, 405 (C. A. 2, 1956).

Page 405:

"The failure of the government to introduce additional witnesses who might be expected to have admissible and relevant information is something which the trier of fact may consider in weighing the evidence. 2 Wigmore, Evidence §285 (3d ed. 1940). An appellate court, however, may not, unless it is shown that evidence material to appellant's defense was suppressed. Morton v. United States, 79 U. S. App. D. C. 329, 147 F. 2d 28, certiorari denied, 324 U. S. 875, 65 S. Ct. 1015, 89 L. Ed. 1428. To do so would be to exceed the proper scope of review, which, as we have already stated, is limited to ascertaining whether the government has presented substantial evidence of every element of the crime."

The authorities cited by appellants, commencing at page 42 of their Opening Brief, are not adverse to the above observations. We have already discussed the *Jackson* case. The case of *United States v. Gordon,* 253 F. 2d 177, as we read it passes upon the insufficiency of the evidence, not upon the inference from failure to produce a witness equally available. The case of *Yaw v. United States,* 228 F. 2d 382 (C. A. 9, 1955) is not directly to point. This case refers to the failure of the prosecution to produce at trial a co-defendant who had plead guilty. The *Yaw* case does not turn upon *equal availability,* but rather upon an example of an important prosecution witness, available to the prosecution, who was also a party to the alleged offense, being not called. The "7-up" man of the instant case was no participant of this offense, at most he may or may not have witnessed events fully covered by other identifying witnesses. The case of *Smith v. United States,* 230 F. 2d 935 (C. A. 6, 1956), is not directly in point. It is true the court in *Smith* briefly refers to the failure of the government to call two witnesses (p. 940, *Smith, supra*). However, in *Smith* the controlling factors for the reversal came from the trial court's instructions with reference to leniency recommendations that the court would be glad to receive—plus reference to the penalty provided for by the relevant statute together with other errors of the instructions.

The Denial of the Names of Witnesses Sought by a Bill of Particulars Was Discretionary and Properly Denied.

It appears to be well established that the matter of granting a bill of particulars is one largely resting within the sound discretion of the trial court, especially as to evidentiary facts.

Stillman v. United States, 177 F. 2d 607 (C. A. 9);

Wong Tai v. United States, 273 U. S. 77, 82;

Nye and Nissen v. United States, 168 F. 2d 846, 851 (C. A. 9, 1949), Aff. 336 U. S. 613;

United States v. General Petroleum Corp., et al., 33 Fed. Supp. 95 (D. C. Cal., 1940).

Excepting in capital cases, *i.e.,* as provided for by 18 United States Code, Section 3432, it is not the function of a bill of particulars to compel the prosecution to disclose the names of its witnesses.

Wayne v. United States, 138 F. 2d 1 (C. A. 8, 1943), cert. den. 320 U. S. 800;

United States v. Brennan, 134 Fed. Supp. 42, at 52-53.

To similar effect regarding either the non-obligation to disclose the names of witnesses or a disclosure of the government's evidence in advance of trial.

United States v. Lavery, 161 Fed. Supp. 283, 287 (D. C. Pa., 1958);

United States v. Lebron, 222 F. 2d 531, 535 (C. A. 2, 1955);

Frederick v. United States, 163 F. 2d 536, 545 (C. A. 9, 1947);

Himmelfarb v. United States, 175 F. 2d 924 (C. A. 9, 1949).

V.

No Reversible Error Was Committed in the Admission or Exclusion of Evidence.

Appellants refer to the above subject commencing on page 42c of their brief.

A. The Telephone Records Reflecting Message Unit Calls From Vandergrifts Phone Number to Cambianos Were Relevant and Properly Admitted.

In our "Statement of the Case" we have related the testimony that Vandergrift lived in an apartment at 10644 Wilshire Boulevard prior and at the time of the robbery of December 19, 1955. That his phone number was GR 7-4148 (Witness Begando from General Telephone Company). That Cambiano resided during this period at 327 North Gower and that he and his wife had rented such place under the name of Burnell not Cambiano. That the phone number of this place (Cambiano's) was HO 3-0325 [R. 326]. That this was a "non published" number, which meant the subscriber's name was not listed in any telephone directory, nor given out by the telephone company [R. 327].

It was then revealed by Exhibit 11, a message unit detailed statement, that from the phone GR 7-4148 (Vandergrift's) to the phone HO 3-0325 (Cambiano's non-published number), starting with December 12, 1955 to and including December 18, 1955, sixteen calls had been made from GR 7-4148 to HO 3-0325. Four of such calls being made on December 17, 1955. Three on December 18, 1955. The robbery was on December 19, 1955. This evidence was clearly relevant as to Vandergrift and Cambiano. It tended to show association. It was not received as to Wagner.

In another robbery case prior association was permitted to be shown, even though such evidence showed the defendants had met in a reformatory. In such case it was held relevant to admit evidence of a telephone call to another telephone number, the number of one of the defendant's girl friend.

> *Bram v. United States,* 226 F. 2d 858, 863 (C. A. 8, 1955).

The existence of phone calls shortly prior to the robbery from one of the defendants' phones to another, a "non-published" number was pertinent as circumstantial evidence tending to show association and probabilities of planning leading to the robbery.

For further authorities wherein it was held competent to introduce records pertaining to long distance telephone calls, see *Blakslee v. United States,* 32 F. 2d 15, 17 (C. A. 1, 1929). In the *Blakslee* case evidence of a number of telephone calls listed in the name of some defendants to others within the period of the conspiracy was held proper, without identifying persons thus communicating, the court holding that strict identity of the persons speaking over the telephone was not necessary.

See also:

> *Duncan v. United States,* 197 F. 2d 935, 937 (C. A. 5, 1952).

Evidence that a certain call was put through was held proper as circumstantial evidence. Slips pertaining to telephone calls between certain numbers held relevant.

> *United States v. Radov,* 44 F. 2d 155, 157 (C. A. 3, 1930).

To similiar effect with regard to records pertaining to telephone calls.

People v. Vacarella, 61 Cal. App. 119, 123 (1923);

Brink v. United States, 60 F. 2d 231, 234 (C. A. 6, 1932).

B. No Error Was Committed in the Cross-Examination of the Defendant Wagner.

On page 44 of Appellants' Brief the contention is made that the cross-examination of the only defendant who took the stand went beyond the scope of the direct examination. No effort has there been made to illustrate just what cross-examination is complained of.

The inquiry as to where Wagner first met Mr. Vandergrift, *i.e.,* in the penitentiary was not heard by the jury [R. 478-479]. This was a bench discussion. The court refused to allow this inquiry although there is law supporting even such an inquiry. See *Bram, supra.* The cross-examination of Wagner was entirely proper. It was developed that he had known both Vandergrift and Cambiano prior to the robbery of December 19, 1955 [R. 480-481]. That he had met Cambiano in either August or September of 1955 [R. 482-483].

Since counsel for appellants has not seen fit to specify just what cross-examination they contend exceeded the scope of the direct, we do not deem it our duty to justify the cross-examination conducted. Wagner, on direct had denied any participation in the robbery, and he had also presented an alibi defense, attempting to have the jury believe he was in Los Angeles rather than at Bellflower, California. It was developed on cross-examination that Wagner had a friend in Bellflower, that he had frequently driven along Bellflower Boulevard prior to December 19,

1955. The entire cross-examination of the defendant Wagner was entirely proper.

The scope that is permitted of cross-examination of a defendant is well stated in *United States v. Lowe,* 234 F. 2d 919, 922 (C. A. 3, 1956):

> "The second reason why there was no error in the exploration of this subject is that it was cross-examination. When a defendant takes the stand in a criminal case he is subject to cross-examination as any other witness is. No authority needs to be cited for the proposition that one of the purposes of cross-examination is to test the credibility of the witness and, subject to the judge's control, that cross-examination may go rather far. The scope of direct examination poses no limitation in this respect. Here the cross-examination was very material in testing the credibility of the defendant. See *United States v. Pagano,* 2 Cir., 1955, 224 F. 2d 682, 685, certiorari denied 350 U. S. 884, 76 S. Ct. 137."

This court has stated in *Austin v. United States,* 4 F. 2d 774, 775 (C. A. 9, 1925):

> ". . . But it is not prejudicial error to admit testimony in rebuttal which should have been offered as part of the main case, unless the party against whom the testimony is admitted is denied the right to controvert or contradict it, and there was no denial of that right in this case."

As stated in *Raffel v. United States,* 271 U. S. 494 (1926) at 497:

> ". . . His waiver is not partial; having cast aside the cloak of immunity, he may not resume it at will, whenever cross examination may be inconvenient or embarrassing."

And as said in *Davis v. United States,* 229 F. 2d 181, 186 (C. A. 8, 1956):

> "Mr. Justice Sutherland, sitting as a Circuit Justice in the case of United States v. Manton, 2 Cir., 107 F. 2d 834, 845, said:
>
> "'* * * The office of cross examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th Ed.) §1308. See Alford v. United States, 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624.'"

The cross-examination was germane to the testimony brought out upon direct examination. The proper limit for fair cross-examination is a matter within the sound discretion of the trial court. A defendant who takes the stand may be cross-examined as fully as any other witness. *D'Aquino v. United States,* 192 F. 2d 338, 369 (C. A. 9, 1951), and many authorities therein cited, including *Powers v. United States,* 223 U. S. 303 at 315. This is the rule concerning matters pertinent to his examination in chief. The cross-examination in the *Powers* case, which was approved, brought out defendants working near a still. To similar effect, *Berra v. United States,* 221 F. 2d 590 at 594 and 597 (C. A. 8, 1955).

The extent to which the broad cross-examination of a defendant is allowed is noted in the case of *United States v. Buckner,* 108 F. 2d 921, 927 (C. A. 2, 1940).

To similar effect *re* cross-examination of a defendant: *Salerno v. United States,* 61 F. 2d 419, 424 (C. A. 8, 1932), where on page 424:

> "The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject matter inquired about."

C. No Error Was Permitted in the Court Permitting the Government to Reopen Its Case and Produce the Testimony of Inspector Hudson.

The court permitted the government to reopen its case as noted [R. 547]:

The reopening of any case is subject to the sound discretion of the court.

See:

Cyc. of Fed. Proc., Vol. 12, 3d Ed., Sec. 48.135.

This circuit has held that it is discretionary with the court to permit the government to reopen, both after the defense and the government has rested.

See:

Lutch v. United States, 73 F. 2d 840 (C. A. 9, 1934);

Medina v. United States, 254 F. 2d 228, 230 (C. A. 9, 1958).

Also, like effect:

Gormely v. United States, 167 F. 2d 454, 459 (C. A. 4, 1948).

The question as to whether evidence shall be received in chief or rebuttal largely rests within the discretion of the trial court.

> *Labiosa v. Government of the Canal Zone,* 198 F. 2d 282 (C. A. 5, 1952) (reversed on other grounds).

This discretion to permit a reopening has been held proper even after the case has been argued and gone to the jury.

> *Jianole v. United States,* 299 Fed. 496, 500 (C. A. 8);

Also note:

> *Burke v. United States,* 58 F. 2d 739, 741 (C. A. 9).

If the defendants were harmed by Postal Inspector Hudson's testimony as to distance from the Federal Building to the scene of the robbery and the time it normally took to drive there and felt that his testimony was not sufficiently qualified, efforts should have been made for a continuance, otherwise it should be deemed as waived.

It is only error to admit testimony in rebuttal which should have been offered in the main case when the party against whom the testimony is admitted is denied the right to contravert or contradict it. No such denial was had in the instant case. See:

> *Austin v. United States,* 4 F. 2d 774, 775 (C. A. 9, 1955).

VI.

No Error Was Committed in Refusing the Admittance of Exhibit E, the So-called Police Record. Its Contents Were Freely Permitted and Used in the Cross-Examination of the Identifying Witnesses.

At this point counsel for appellee desires to digress in a gentle chiding of his friend Mr. Lavine, for not complying with the addition to Rule 18 of this Court's Rules, *i.e.* "2(f)." We find no appendix in Appellants' Opening Brief stating page references where this exhibit, defendants' E for identification, was offered or rejected as evidence.

This Exhibit E for identification purports to be Broadcast No. 8 of December 19, 1955 issued by the office of E. W. Biscailuz, Sheriff—containing information pertaining to a robbery—namely the robbery here in question—and further containing some descriptions of certain of the suspects.

No effort is made in this purported copy of the broadcast to reveal from what source the information it contained was obtained. Nor does the exhibit show or purport to show that the purported descriptions were within the personal knowledge and observation of the recording official or his subordinates. This exhibit of itself was clearly hearsay. All documents or records made in the regular course of business (28 U. S. C., Sec. 1732) are not necessarily admissible merely because they are such records.

This Exhibit E was first offered during the testimony of Police Officer Ward of the City of Los Angeles [R. 410]. It is noted that a Police Officer of the City of Los Angeles was attempting to qualify a document from the Sheriff's office. The court's observation respecting this document

on pages 411 and 412 of the record are sound. It isn't only a question of a foundation to show that it is a business record that is kept in the normal course of business. What the Sheriff's office may have broadcast is not necessarily relevant and material to the issues on trial in the instant case. The defense could not be bound by the contents of such a recorded broadcast. The document does not attempt to, nor indeed disclose the source of its information. It is indeed hearsay upon hearsay, with no attempted foundation to reveal from whom the information was procured. This document should not be used to impeach Bonner, Martin or Hunt, which of course was the purpose of its being offered. Moreover, as we shall soon reveal, the descriptions here contained were liberally utilized in endeavoring to show a conflict in the identifying witnesses' first account as compared to the actual appearances of the defendants. [Colloquy between court and counsel concerning this subject extends from R. 410 through R. 418.]

A police report of an accident based in part on what others had told reporting officer as well as personal observations was inadmissible.

> *Gencarella v. Fyfe,* 171 F. 2d 419, 421 (C. A. 1, 1948).

A report prepared and filed by soldier's commanding officer which was not the result of what he actually saw, but which contained data and conclusions that must have been given to him by a witness, was held to be inadmissible.

> *Caudill v. Victory Carriers,* 149 Fed. Supp. 11, 13 (D. C. Va., 1957).

This court has stated with reference to documents prepared by public officials pursuant to a duty imposed by law

or required by the nature of their offices to be admissible as proof of the facts therein stated subject to the qualifications noted in *Olender v. United States,* 210 F. 2d 795, 801 (C. A. 9, 1954).

Page 801:

> ". . . Thus this circuit and most of the other circuits which have passed on the question have held that the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates, and that reports based upon general investigations and upon information gleamed second hand from random sources must be excluded." (Citing many cases.)

See also:

Wigmore on Evidence, Sec. 1635 (3d Ed.), p. 531.

A statement which would be inadmissible as hearsay if oral is not made admissible by the fact that it has been written.

Randel v. State, 153 Tex. Crim. 282, 219 S. W. 2d 689;

Fite v. State, 158 Tex. Crim. 611, 259 S. W. 2d 198.

The *Fite* case, *supra,* dealt with a robbery charge. The defendant, as here, sought to show that the witness in reporting the robbery described the robber as red-headed whereas defendant's hair was black. The trial court excluded the officers "offense report" which showed a notation describing the suspect as having "dark red hair." The Court of Appeals concluded that such report was properly excluded. The *Fite* case is very similar to the instant case.

See also:

Wharton's Criminal Evidence, Vol. 1, 12th Ed., Sec. 250, p. 577;

Witkin, California Evidence, Secs. 290-291 (1958).

Government "Status Reports" would not be admissible as an official record, since it did not appear that they related to matters within the personal knowledge of the persons who made the records and as to which they could testify.

Yung Jin Teng v. Dulles, 229 F. 2d 244, 247 (C. A. 2, 1955).

Compare:

United States v. Grayson, 166 F. 2d 863, 869 (C. A. 2, 1948);

Hoffman v. Palmer, 129 F. 2d 976 (C. A. 2, 1952), aff. 318 U. S. 109;

Mullican v. United States, 252 F. 2d 398, 404 (C. A. 5, 1958);

Hartzog v. United States, 217 F. 2d 706, 708 (C. A. 4, 1954);

Owens v. United States, 174 F. 2d 469 (C. A. 5, 1949).

The Equivalent in Descriptions as to That Contained in the So-called Police Record Was Presented to the Jury Through Cross-Examination of Identifying Witnesses and Through Defense Witnesses.

It is to be observed that when Postmaster Martin was cross-examined, he was confronted with a description he had given to Deputy Sheriffs concerning age and height of one of the men [R. 286]; that he may have told one of the Deputy Sheriffs that one of the men had straight

brownish hair and the other man was described as between 40 and 45 years of age [R. 287-288]. An inspection of Exhibit E clearly reveals cross-examining counsel for the defense had obtained this description from such exhibit. He, Martin, testified to identifying the defendants at the police show-up on January 12th [R. 290].

Assistant Postmaster Bonner likewise was cross-examined as to descriptions he had given to Deputy Sheriffs concerning the suspects of the robbery—age—weight, complexion [R. 132-133]. This information was obviously from Exhibit E, the so-called Police Record. Again a description is given concerning Wagner [R. 134, 136] ". . . between 45 and 50 years old, between five-seven and five-eight, a thinnish looking face, wearing a brown checkered sportscoat." Compare this to Exhibit E. Cambiano was also described ". . . dark complexion, either Italian or Potuguese." Bonner was cross-examined as to what he may have told a newspaper reporter [R. 137]. He testified that the first time he positively identified Wagner was at the police show-up of January 12, 1956. Additional, such cross-examination with respect to a mask slipping down on one of the men is noted [R. 168].

Martin was also cross-examined as to descriptions he had given to the Sheriff's office [R. 299]. That at the police show-up he identified Vandergrift "except for the hair" [R. 300]. He described the driver of the car, Cambiano [R. 309]. Bonner refers to Wagner—the profile of his nose and lips [R. 194]. That this event was an unusual event in his life—that he had never been robbed before.

The defense likewise called officers from the Sheriff's office. Deputy Sheriff Le Bas was called by the defense, he testified to having interviewed Martin and Bonner

"later that evening" [R. 365]. Bonner had told him about the handkerchief slipping down on Wagner [R. 369-370]. That Bonner had told him he could positively identify Wagner because the handkerchief mask had slipped down momentarily to below the chin [R. 372]. Officer Tierman testified to his conversation directly after the robbery with Bonner [R. 423] including age given, the handkerchief slipping down [R. 424]. The description given of the other suspect—age, height, weight, color of hair [R. 425]. Again what Bonner had told him [R. 431]. The court was liberal in allowing the defense to secure from Deputy Sheriff Pyeatt the information he had secured from Bonner and Martin [R. 443-444], after which the court in sustaining a renewed objection to Exhibit E observed: "He has testified to what you were trying to get in" [R. 445].

Thus we see the equivalent to Exhibit E was secured by the defense. If error it be to have excluded this broadcast, it should be characterized as harmless.

Rule 52(a), Fed. Rules of Crim. Proc.

VII.

No Error Existed in the Denial of the Post Office Inspectors' Reports.

The facts of this case are not in line with *Jencks* (353 U. S. 657). *Jencks* dealt with *statements* made by undercover agents who testified they had made oral or written reports to the F.B.I. on the matters to which they had testified. The court held the denial of such statements for inspection to be error.

In the instant case so far as Assistant Postmaster Bonner is concerned, he stated he made no description of the men in his report to Washington [R. 14]. He did

state that he told the Postal Inspector that he described the man who held him up as a man between 40 to 45 years of age and five feet seven inches in height [R. 141, lines 1-6]. It is thus seen that any discrepancy in the actual description of this person Wagner was already presented to the jury who heard the testimony and saw Wagner. The jury no doubt resolved that there was no real conflict —rather the human quality of persons often unable to accurately describe a person they had seen but able to recognize the person when seen again.

We have already discussed under a previous heading how liberal the court was in allowing the utmost of examination of possible conflict in the descriptions both Bonner and Martin may have originally given to the various officers including those from the Sheriff's office, compare to what the jury observed to be the description of the defendants who sat in court during the trial. All that could be expected from the Reports was to show a possible conflict; this the court liberally permitted during the cross-examination including even information gleaned from the Sheriff's broadcast, Defendants' Exhibit E for identification only.

Postmaster Martin was asked if he made a report to Washington, to which he said:

"A. I made a report, yes, sir" [R. 292].

Counsel dropped such inquiry with that answer and nothing was asked as to the contents of such report.

All identifying witnesses had been on and off the stand when it was first demanded that the government produce for the defense's inspection the report made by the postal authorities to the United States Government in Washington [R. 417]. This demand was made while the defense

were putting on their case and the prosecution had rested some 82 Reporter's Transcript pages prior to this demand [R. 335, line 23]. No government witness was on the stand when this omnibus demand was made, no attempt had been made to illustrate that any of the identifying witness had made statements concerning identity that the defense might expect or hope to be included in such a formal postal report to Washington. *Jencks* had not as yet been born. The defense here relied upon *Gordon,* 344 U. S. 414. The *Gordon* case was not in point, it concerned a key witness admitting on cross-examination that he had given to government agents a written statement that conflicted with his testimony incriminating a defendant then on trial. Such is not the case here.

We are unable to locate in the record, and so far appellants have not so indicated in their opening brief, a foundation justifying statements a defense counsel urged at trial concerning what was contained in such an alleged reported as noted in the request [R. 417 *et seq.*].

Surely this is not parallel to *Jencks,* where on cross-examination of the government's witnesses it was there clearly developed that such witnesses had regularly made written reports to the F.B.I. Furthermore as we recall the record up to this point, the defense did not know, they may have surmised, that there was in fact any such report or reports in existence made by an investigating Postal Inspector. Postal Inspector Hudson had not as yet testified, nor had any other postal inspector testified. Postal Inspector Hudson did not testify until the day following the now so-called *Jencks* demand. Inspector Hudson was called as a rebuttal witness, commencing [R. 515] and again after the prosecution had been permitted to reopen its case [R. 542]. We are unble to find one word of inquiry made of Inspector Hudson con-

cerning any report, while he was cross-examined upon the above noted two occasions. If such inquiry was gone into surely the appellants should so indicate.

Indeed upon two occasions one of counsel for the defense suggested he would call Inspector Hudson for the purpose of laying a more exact foundation to the demand [R. 419 and 421]. Despite which we are unable to locate in the record where he, Inspector Hudson, was so called.

This court has discussed the application or non-application of *Jencks* to appeals from trials occurring prior to the *Jencks* opinion. One recalled to the writer is *Harris v. United States,* F. 2d (June 24, 1958), rehear. den. Nov. 6, 1958, ... F. 2d See also: *Rios v. United States,* 256 F. 2d 173, 177 (C. A. 9, 1958).

The *Roviaro* case (353 U. S. 53) cited by appellants under this heading does not appear to be relevant. *Roviaro* dealt with the failure to disclose the identity of an informer in a narcotics case, where the charge viewed in connection with the evidence introduced at trial was so closely related to the informer as to make his identity and testimony highly material. No informer is involved in the instant case.

It is well known that the *Jencks* case gave rise to Congress enacting in 1957 a statute dealing with and defining "statements" of witnesses who had been called to testify. We refer to 18 U. S. C. 3500. Such statute would not contemplate the demand here made.

VIII.

No Reversible Error Occurred in the Giving or Refusal of Instructions.

Error asserted concerning instructions commences on page 51 of Appellants' Opening Brief. The instructions given are reflected in the Reporter's Transcript commencing at page 661 and ending at page 676.

It appears to be fundamental that a reviewing court is not required to go further with respect to the trial court's instructions than to determine from the whole instructions as to whether they properly submitted the cause to the jury. The charges are not to be considered in isolation, but from their entirety.

> *Herzog v. United States,* 235 F. 2d 664, 667 (C. A. 9, 1956);
>
> *Taylor v. United States,* 142 F. 2d 808, 817 (C. A. 9, 1944), cert. den. 323 U. S. 723;
>
> *Samish v. United States,* 223 F. 2d 358 (C. A. 9, 1949);
>
> *Finn v. United States,* 219 F. 2d 894, 902 (C. A. 9, 1955), cert. den. 249 U. S. 906;
>
> *Las Vegas Merchants Plumbers Association v. United States,* 210 F. 2d 732, 749 (C. A. 9, 1954).

Tested by the principles above announced the instructions given and those refused constituted no error.

Complaint is leveled against Government's Proposed No. 4 [Clk. Tr. p. 27]. This was given. Complaint is now asserted that it improperly included the term "presumption" with respect to the guns being loaded. First, it is to be observed that this instruction said nothing with respect to an inference of guilt, it merely correctly in-

formed that in robbery cases the gun need not be loaded to consider if a gun or pistol is a dangerous weapon. This instruction was supported by the post office robbery case of *Madigan v. United States,* 23 F. 2d 180, 182 (C. A. 8, 1927). The Court observed at page 182:

> ". . . In considering the threatening use made of the fire-arms in pointing them at the custodian of the mails, he said it was not necessary that it be proved that the guns were charged, the presumption being that it was so until the contrary should be proved."

Robbery is an offense more generally prosecuted under state laws. The California cases are legion on the principle that the gun need not be loaded. *People v. Coleman,* 53 Cal. App. 2d 18, 127 P. 2d 309, 314 (a toy pistol); *People v. Ward,* 84 Cal. App. 2d 357, 190 P. 2d 972, 974 (a toy pistol, which victim believed to be a real gun); *People v. McKinney,* 111 Cal. App. 2d 690, 245 P. 2d 24 (use of a hammer to simulate a gun, the question as to it being a dangerous or deadly weapon presented a jury question); *People v. Raner,* 86 Cal. App. 2d 107, 194 P. 2d 37 (an unloaded gun).

It is true that under certain circumstances the use of the word presumption in place of inference has been frowned upon. The instructions in the case were carefully gone over in conference [R. 563-579]. When the court stated he planned to give Government's Proposed No. 4, no specific objection was then made by counsel to such instruction because it contained the term "presumption" [R. 564]. Had counsel then suggested the more appropriate word "inference," it is probable the Court's attention would have been alerted and "inference" would have replaced the word "presumption." No, Counsel did

not make such a specific objection until after this instruction had been given. This, if error we believe to be harmless error and not a justifiable ground for reversal.

An error in a charge does not require reversal unless rights of the accused have been substantially prejudiced. *United States v. Kushner,* 135 F. 2d 668, 674 (C. A. 2, 1943), cert. den. 320 U. S. 212. It has been held that the use of the word "presumption" in a charge was not improper when considered in light of the remaining charge. *United States v. Angelo,* 153 F. 2d 247 (C. A. 3, 1946).

In absence of a presumption created by statute, it is better practice to charge in criminal cases on permissive inferences that may be drawn from the evidence rather than in terms of presumptions, but every charge of a presumption other than that of innocence does not result in reversible error. *Bernstein v. United States.* 234 F. 2d 475, 486 (C. A. 5, 1956), cert. den. 352 U. S. 915.

With reference to an instruction containing a clause heretofore disapproved by this Circuit, this court nevertheless recently sustained a conviction where such clause was included. *Shaw v. United States,* 244 F. 2d 930, 938-939 (C. A. 9, 1957). In *Shaw* this Court observed (p. 939):

> "The instructions are not a magical formula, any deviation from which is necessarily fatal on appeal. The trial may be held to be unfair to a defendant when formalism is rigidly observed. But nothing requires this Court to release a defendant obviously guilty because there has been a deviation from a standard of absolute perfection, but where we can affirmatively say the defendant has suffered no harm thereby."

An instruction that a person is presumed to intend the natural consequences of his own act was held to be non-prejudicial where the court dealt at length with the necessary intent. *Bianchi v. United States,* 219 F. 2d 182, 194 (C. A. 8, 1955), cert. den. 349 U. S. 915.

In *United States v. Di Carlo,* 64 F. 2d 15 (C. A. 2, 1933), presumption rather than inference was employed, the Court stated (p. 17):

> "The judge in his charge spoke of the inference which the jury might draw because of possession of a stolen car, as a presumption of law. While this was not strictly correct, and the presumption, or, speaking more properly, the inference which might be indulged in, was one of fact, *we have no reason to suppose that the jury were misled as to their duties.* After employing the word 'presumption' somewhat inartificially, he charge them that the 'presumption of possession is to be taken into consideration with all the other evidence in the case,' that the evidence in the case was circumstantial, and that 'the circumstances must be consistent with guilt all the way through. It is a chain which must be equally strong in every link and therefore the circumstances must be such that you are able to say that the government has established the fact that the defendant committed this crime beyond reasonable doubt.' *We see nothing prejudicial in what was said."*

See also *United States v. Seeman,* 115 F. 2d 371, 374 (C. A. 2, 1940), for holding that use of word presumption did not mislead jury.

A defendant is entitled to a fair trial but not a perfect one. *Lutwak v. United States,* 344 U. S. 604 (1953).

We next refer to the defense's rejected instruction No. 1 [Clk. Tr. p. 14] and Defendants' No. 14 [Clk.

Tr. p. 22]. Both of these instructions were properly rejected, they are of an argumentative nature, matters to be handled by counsel in their address to the jury, not points of law to be given by the court. The trial court's comment with respect to both of these instructions was sound [R. 567]:

> "The Court: Frankly, I consider it a wrong instruction, like you have a similar instruction which is your No. 14. I consider it always improper, as a matter of fact, even for the defendant, because what you are doing is limiting the consideration of the jury, and it should not be limited. They take into consideration—you are telling them to consider certain things. The jury may consider all the evidence; not just certain things. It is improper to limit a jury's consideration."

Defendants' rejected Instruction No. 4 [Clk. Tr. p. 17] dealt with the alibi defense. The court gave a full and proper instruction which was substantially the same thing, except a little simpler [R. 669, lines 5-17]. The courts have repeatedly stated that it is not the exact words of a proffered instruction that must be given—the substance is sufficient. *Ehrlich v. United States,* 238 F. 2d 481, 484 (C. A. 5, 1956); *Kasper v. United States,* 225 F. 2d 275, 280 (C. A. 9, 1955); *Lemke v. United States,* 211 F. 2d 73, 76 (C. A. 9, 1954), cert. den. 347 U. S. 1013.

Defendants' proposed instruction No. 5 [Clk. Tr. p. 18] was properly refused. This instruction was suggested because the government did not call the "7-up" man as a witness. We have discussed this problem under another heading. See heading number IV of this brief. This person was equally as available for the defense as for the prosecution—no inference should be drawn from

the failure of the government to produce such witness. Three identifying witnesses were produced. The rejection of this instruction was proper.

Defendants' requested instruction No. 15 [Clk. Tr. p. 23] was properly rejected inasmuch as it was substantially covered by an instruction given [R. 571; 673, line 10, to 674, line 13].

IX.

No Error Was Committed in Denial of Defendants' Motion for Judgment of Acquittal.

On page 61 of Appellant's opening brief it is contended that the Court erred in denying their motions for judgment of acquittal at the close of the case. These motions are reflected in the Reporter's Transcript commencing at page 559, line 14.

Appellants assert that they had been tried before, which resulted in a hung jury and no new evidence was introduced at this retrial. It is difficult to follow such a premise as a justification for a judgment of acquittal. In the instant trial all defendants had been identified by eyewitnesses as participants in the robbery. Note the testimony of the Postmaster Martin, Assistant Postmaster Bonner and Witness Hunt. Such a situation presented a jury question, a question of fact, with credibility to be determined by the jury. The fact that no fingerprints were found in the car, as those of the appellants, does not establish their non use of the "get away" car. They were seen to have entered it and drive away in it. The logical inference is that they were adept at removing telltale fingerprints. The testimony is that Vangergrift and Wagner were both armed with guns when they robbed the postal officials of postal property.

In considering a motion for judgment of acquittal the governing rule is 29(a) of the Federal Rules of Criminal Procedure, Title 18. This Court has stated the rule to be applied when such a motion is made in *Elwert v. United States,* 231 F. 2d 928 (C. A. 9, 1956), as follows (p. 933):

> ". . . The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. If, under this test, the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits, this court applies no special rule to review circumstantial evidence on appeal. As to circumstantial proof of intent see this court's in banc decision in McCoy v. United States, 9 Cir., 169 F. 2d 776, certiorari denied 1948, 335 U. S. 898."

The trial court was correct in its rulings and is fully supported by the evidence of the case and the governing law. When a motion for a judgment of acquittal is made, the law appears to be that the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the government, tends to show the defendant is guilty beyond a reasonable doubt. *Hemphill v. United States,* 120 F. 2d 115, 117 (C. A. 9, 1941), cert. den. 314 U. S. 627; *Gorin v. United States,* 111 F. 2d 712, 721 (C. A. 9, 1940), aff'd 312 U. S. 19; *Bell v. United States,* 251 F. 2d 490, 491 (C. A. 8, 1951).

No quantity of contradictory evidence will authorize the trial court to direct a verdict if there is sufficient

substantial evidence to take the case to the jury. *Ross v. United States,* 197 F. 2d 660, 665 (C. A. 6, 1952).

A case often quoted on this subject is *Curley v. United States,* 160 F. 2d 229, 232 (D. C. Cir., 1947), cert. den. 331 U. S. 837, it is stated on page 232:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

And on page 237, the Court said:

> "If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury."

It is difficult to see the relevancy of the cases cited by appellants under this subject. The *Stone* case, 223 F. 2d 23, a marihuana conviction, deals with the question as to whether there was sufficient proof of the offense to sustain the conviction, that is whether it occurred in the Western or Northern District of Texas. The case was remanded. The *Reamer* case, 229 F. 2d 884, it is true, concerns itself with identification during a robbery. The identification of the appellant was solely by his voice, page 885, ". . . There was no other clearly identifying testimony. . . ." The conviction in *Reamer* was based on voice alone.

In the instant case not only do we have visual identification plus that of voice but also by way of illustration Bonner referred to one of the assailants, the No. 2 man

or Wagner, by ". . . the profile of his nose and lips" [R. 194].

> "Q. All you remember is sort of a thinnish type face of a distinguishing profile? A. Yes" [R. 194].

Witness Martin gave a description of defendant Cambiano [R. 309]. Witness Hunt likewise identified Cambiano [R. 230] and describes him [R. 242, line 19; 243, line 16; 244, line 13; 247 and 250].

Martin had identified Vandergrift [R. 254-255] and again explained such identification at the police show up "except for the hair."

It is common knowledge that a person may lack the ability to accurately describe a person he has seen or be unable to draw an accurate sketch of such person—but may very well retain an indelible memory of such person or object—especially of an unusual event—and have the chord of recognition vividly recalled when once again confronted with such individual. Our brains work just that way and not infrequently. Such an incident as here witnessed imprints itself within a man's mind.

The law requires no more than direct and positive evidence such as here exists. *Malone v. United States,* 238 F. 2d 851, 852 (C. A. 6, 1956), a robbery case. As a follow up to the *Reamer* case cited by appellants and discussed above, see *Thompson v. United States,* 233 F. 2d 317 (C. A. 6, 1956). The codefendant of Reamer was convicted and the verdict sustained on appeal. The court noted, page 318:

> ". . . while the identification of Reamer was by voice alone unsupported by any other circumstance, the appellant was identified not only by voice but by his eyes by testimony of the bank cashier . . ."

Compare *re* sufficiency of identification:

People v. Thompson, 147 Cal. App. 2d 543, 305 P. 2d 274;

People v. Gardiner, 128 Cal. App. 2d 1, 274 P. 2d 908, 910.

Reliability of testimony as to identification is for the jury to determine. *People v. Walker,* 154 A. C. A. 175, 315 P. 2d 740, 743, 744. To entitle a reviewing court to set aside a jury's finding of guilt, the evidence of identity must be so weak as to constitute practically no evidence at all. *People v. Braun,* 14 Cal. 2d 1, 92 P. 2d 402, 404.

Conclusion.

It is respectfully submitted that the judgments of conviction herein being reviewed should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Attorney,

Attorneys for Appellee.

No. 16,001

IN THE

United States Court of Appeals

For the Ninth Circuit

NEIL J. McCONLOGUE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
RICHARD H. FOSTER,
Assistants United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

FILED

JUL 25 1958

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdiction	1
Statement of the case	1
Question presented	2
Argument	2
I. Appellant appealed to the wrong court	2
II. The court was under no misapprehension	4
Conclusion	5

Table of Authorities Cited

	Pages
18 United States Code, Section 2314	2
28 United States Code, Section 2255	1, 2, 3, 4

No. 16,001

IN THE

United States Court of Appeals

For the Ninth Circuit

NEIL J. McCONLOGUE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted in the Northern District of California for alteration and uttering of a Postal Money Order on February 8, 1956. On February 9, 1956 appellant was arraigned and counsel was appointed to represent him. On February 14, 1956 appellant entered a plea of guilty to the first count of the indictment and was sentenced on March 6, 1956. Appellant was sentenced to a term of five years by the Honorable Michael J. Roche, United States District Judge for the Northern District of California. On

August 9, 1956 appellant was sentenced to a term of two years for a violation of Section 2314 of Title 18 United States Code (Interstate Transportation of Forged Checks) in the Eastern District of Michigan by United States District Judge Arthur A. Koscinski. On October 22, 1957, more than sixty days from the date of judgment in the Northern District of California case, appellant moved to vacate and set aside sentence on the grounds that the judgment and sentence of the Court did not "represent the true views of the Court." An Order to Show Cause was issued by Judge Roche on November 26, 1957 and a return to the Order to Show Cause was filed by the United States through its attorneys Lloyd H. Burke and Donald B. Constine. On February 20, 1958 Judge Roche ordered the Order to Show Cause discharged and denied appellant's motion for relief under Section 2255 of Title 28 United States Code. Appeal from the order denying relief under Section 2255 was then timely made to this Court.

QUESTION PRESENTED.

Can the Court below properly deny appellant relief under Section 2255 of Title 28 United States Code?

ARGUMENT.

I. APPELLANT APPEALED TO THE WRONG COURT.

Section 2255 of Title 28 United States Code provides a means for questioning the validity of judgments in the District where sentence is imposed. In

the instant case appellant's complaint concerns not the five year sentence imposed in the Northern District of California on March 6, 1956, but concerns the two year sentence of imprisonment imposed by the Eastern District of Michigan on August 9, 1956. His complaint seems to be that some sort of promise was made that no further action would be taken by the Michigan authorities in view of his plea of guilty and sentence in the Northern District of California.

Assuming, but not conceding, that this is the fact, no invalidity would attach to the sentence imposed in the Northern District of California. On the contrary, the proper place for appellant to complain would be in the Eastern District of Michigan where the two year sentence, which he contends should not have been imposed, was in fact given. The record, of course, does not indicate that any promise of any nature from anyone was ever given to appellant. If, however, the United States was bound by some representation allegedly made, the only action which could be taken would be to invalidate the sentence which appellant contends should never have been imposed. Appellant did not complain at the time nor does he appear to complain now of the five year sentence imposed by the Court below. His motion for relief, therefore, should have been directed to the United States District Court for the Eastern District of Michigan. Section 2255 only authorizes attack at "the Court which imposed the sentence."

With respect to the Northern District of California sentence, appellant is not claiming that "the sentence

was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum imposed by law or is otherwise subject to collateral attack." Appellant has, therefore, brought the 2255 proceeding in the wrong jurisdiction.

II. THE COURT WAS UNDER NO MISAPPREHENSION.

Appellant's claim in this case is based upon an alleged misapprehension on the part of the sentencing Judge. In his motion appellant claims that the judgment did not represent the "true views of the Court." Nowhere in the records or files of the Court is there any indication that such was the case. A full transcript of the entire proceedings in this case is a part of the record on appeal. The record reflects that appellant had already entered a plea of guilty with respect to the offense in the Eastern District of Michigan, Record 21. There was, to be sure, some indication that the Michigan Court might consider the fact that sentence had been imposed in the Northern District of California. As a matter of fact that appears to be what they did, since appellant had a criminal history extending back to February 1917, five prior felony convictions, and had escaped from custody prior to sentence in the Michigan case, TR 18. The sentence, however, in the Michigan Court was only two years.

In any event, however, the Court was not concerned with what action would be taken by the Michigan

authorities. The Court expressly stated "I am not traveling to Detroit looking for work; I have plenty of it here." The Court then gave sentence of five years. Nowhere in the record is there the slightest indication that the Court intended to give any lesser term of years if the Michigan Court were to impose a sentence. As the Court strongly indicated it was impossible at the time to look into the future and determine what action would be taken in the Michigan District. The Court, therefore, imposed a sentence in accord with appellant's prior criminal history. This action would of course be taken into consideration when and if the Michigan Court had occasion to pass on appellant's case. The record simply reflects and the Court below decided that the judgment was precisely what the Court intended.

CONCLUSION.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 23, 1958.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
RICHARD H. FOSTER,
Assistants United States Attorney,
Attorneys for Appellee.

No. 16002

United States
Court of Appeals
for the Ninth Circuit

HAROLD ROBERTS, et al., Appellants,

vs.

FEDERAL CROP INSURANCE CORPORATION, Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

FILED
JUL 15 1958
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—7-7-58

No. 16002

United States
Court of Appeals
for the Ninth Circuit

HAROLD ROBERTS, et al., Appellants,

vs.

FEDERAL CROP INSURANCE CORPORATION, Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of C. M. Clark..... 46

Exhibit F—Letter Dated Apr. 16, 1956, Federal Crop Ins. Corp. to Lloyd McLean.... 48

Exhibit G—Letter Dated May 10, 1956, Kimball & Clark to Creighton F. Lawson..... 50

Exhibit I—Letter Dated May 21, 1956, Federal Crop. Ins. Corp. to Kimball & Clark.. 51

Affidavit of Lloyd McLean..... 54

Amended Answer; Counterclaim..... 7

Exhibit A—Application for Crop Insurance; Crop Insurance Acreage Report, 1956, Dated Sept. 12, 1955; Statement of Debtor's Account as of June 27, 1956..... 9-17

Amended Answer and Counterclaim, Second... 17

Amended Complaint 22

Appeal:
Certificate of Clerk to Transcript of Record on 77
Notice of 77
Statement of Points on (USCA)..... 80
Certificate of Clerk to Transcript of Record... 77
Complaint 3
Motion for Leave to File Second Amended Complaint 72
Motion to Dismiss or in the Alternative for Summary Judgment 25
Affidavit of Creighton F. Lawson..... 26
Exhibit A—Copy of Insurance Policy..... 31
Exhibit B—Proof of Loss Form..... 41
Exhibit C—Copy of Statement of Creighton F. Lawson, April 9, 1956..... 43
Exhibit D—Copy of Letter Dated May 9, 1956, Ned W. Kimball to Federal Crop Ins. Corp. 43
Names and Addresses of Attorneys..... 1
Notice of Appeal..... 77
Opinion 55
Order Denying Motion for Reconsideration of Summary Judgment, For Vacation Thereof and for Leave to File Second Amended Complaint 76

Order for Summary Judgment..... 70

Reply to Second Amended Answer and Counterclaim 21

Second Amended Answer and Counterclaim... 17

Statement of Points To Be Relied Upon (USCA) 80

NAMES AND ADDRESSES OF ATTORNEYS

KIMBALL & CLARK,
Waterville, Washington,

Attorneys for Plaintiffs-Appellants.

WILLIAM B. BANTZ,
United States Attorney,

ROBERT L. FRASER,
Assistant U. S. Attorney,
334 Federal Building,
Spokane, Washington,

Attorneys for Defendant-Appellee.

In The Superior Court of the State of Washington, County of Douglas

No. 8133

HAROLD ROBERTS, RALPH McLEAN, ROBERT JESSUP, GEO. A. MURISON, ANDREW G. NILLES, H. E. McDONALD, W. H. McDONALD, M. E. SCHEIBNER, THEODORE B. RICE, LOREN W. PENDELL, J. E. THOREN, E. O. McLEAN, E. G. BRANSCOM, S. A. BUCKINGHAM, R. E. BUCKINGHAM, DAVIS BROS., DAVID G. DAVIS, T. R. DAVIS, FRANK MILLER, LLOYD McLEAN, CLAUDE MILLER, MILLER BROS., E. E. SMITH, CLYDE W. MILLER, RUSSELL H. HUNT, EDWIN MILLER, CLARENCE DAVIS, TERESSA M. DAVIS, EUGENE FREDERICK, J. W. BUOB & SONS, JOHN A. DANIELSON, W. J. HAWES, GEO. JORDAN & SONS, DALE LEANDER, LUCILE E. BESEL, CARL H. VIEBROCK, ORVAL SUPPLEE, CLARENCE R. EDGEMON, E. V. VAUGHN, CHARLES D. OLIN and JAMES EDGEMON, CLARENCE ADAMS and DAVID ADAMS, Plaintiffs,

vs.

THE FEDERAL CROP INSURANCE CORPORATION, a Government Corporation, Defendant.

COMPLAINT

Come now the plaintiffs and for a cause of action against the defendant allege as follows:

I.

That all the above named plaintiffs are farmers farming lands in Douglas County, Washington, and all are holders of policies of crop insurance issued by defendant.

II.

That the defendant is a government corporation

established under the Department of Agriculture and does business in Douglas County, Washington, through agents duly appointed by said Corporation. [1]*

III.

That each of the above named plaintiffs seeded winter wheat in the late summer of 1955, which said winter wheat was found to be a total loss in the Spring of 1956 when the snow melted off the land.

IV.

That the insurance policy, in the insuring clause, reads as follows:

"In consideration of the representations and provisions in the application upon which this policy is issued, which application is made a part of the contract, and subject to the terms and conditions set forth or referred to herein, the Federal Crop Insurance Corporation (hereinafter designated as the Corporation) does hereby insure * * * (Hereinafter designated as the insured) against unavoidable loss on his wheat crop due to drought, flood, hail, wind, frost, winter-kill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes as may be determined by the Board of Directors of the Corporation."

V.

That paragraph entitled "8. Insurance period" of said insurance policy reads as follows:

* Page numbers appearing at bottom of page of Original Transcript of Record.

"Insurance with respect to any insured acreage shall attach at the time the wheat is seeded." * * *

VI.

That paragraph entitled "16. Time of loss." of said insurance policy reads as follows:

"Any loss shall be deemed to have occurred at the end of the insurance period, unless the entire wheat crop on the insurance unit was destroyed earlier, in which event the loss shall be deemed to have occurred on the date of such damage as determined by the Corporation."

VII.

That paragraph entitled "6. Coverage per acre." reads as follows:

"The coverage per acre established for the area in which [2] the insured acreage is located shall be shown by practice(s) on the county actuarial table on file in the county office. The coverage per acre is progressive depending upon whether the acreage is (a) First Stage—released and seeded to a substitute crop, (b) Second Stage—not harvested and not seeded to a substitute crop, or (c) Third Stage—harvested."

VIII.

That on April 9, 1956, after it was determined that the seeded crop was a total loss, the plaintiffs, at a meeting at St. Andrews, Washington, received information from one Creighton Lawson, Washington State Director of the defendant Corporation, that no claims would be paid to the plaintiffs for the loss sustained to the 1956 wheat crop if

plaintiffs made claims under the Sections of the policy quoted herein.

IX.

That as a result of the repudiation of the contract by the defendant, plaintiffs, in order to mitigate their damage, were forced to reseed the acreage on which the winter wheat crop had been lost at a cost of $6.50 per acre, and that plaintiffs lost crop on and reseeded approximately 25,000 acres.

X.

That, depending on the yield of the 1956 crop as reseeded, the above mentioned repudiation of the contract by defendant may result in further damage to the plaintiffs in an amount equal to the difference between the actual amount harvested and the insured amount of wheat and that in order to perfectly protect the plaintiffs the Court should direct that the insurance be reinstated.

Wherefore, Plaintiffs pray for damage in an amount equal to the sum determined by multiplying the number of insured acres reseeded by $6.50 per acre plus interest; for judgment reinstating the insurance contract; for their costs and disbursements herein [3] expended; and for such other and further relief as to the Court may seem just and equitable.

KIMBALL & CLARK,

/s/ By NED W. KIMBALL,

Attorneys for Plaintiffs.

Duly Verified.

[Endorsed]: Filed September 4, 1956.

[Title of District Court and Cause.]

AMENDED ANSWER; COUNTER-CLAIM

Comes now the defendant, United States of America, through William B. Bantz and Robert L. Fraser, attorneys in the office of the United States Attorney for the Eastern District of Washington, and answer the complaint in the above entitled case as follows:

I.

Admit Paragraph I of the complaint with the exception that the defendant denies that it had issued policies of insurance to the parties plaintiff named as follows: Theodore B. Rice, E. G. Banscom, Frank Miller, Claude Miller, Teressa M. Davis, Geo. Jordan & Sons, Dale Leander, Clarence Adams.

II.

The defendant will admit Paragraphs II, III, IV, V, VI, and VII.

III.

The defendant denies Paragraph IX of the complaint and alleges [15] that a meeting of wheat producers in St. Andrews, Washington, on April 9, 1956, Creighton Lawson, Washington State Director for defendant, informed those present that if claims for loss of 1956 wheat production were made at that time, such claims, in his opinion, would be rejected, and that he was authorized to speak for the Corporation; and said statement was in accord with provisions of the act and the wheat crop insurance contracts.

IV.

The defendant denies Paragraph IX except that defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that the cost of reseeding wheat was $6.50 per acre; and alleges further that parties plaintiff have reseeded an aggregate of 16,003.1 acres according to their own certified wheat crop insurance acreage reports filed by them with defendant pursuant to § 3 of their policies of insurance.

V.

Defendant denies Paragraph X by reason of the fact that it does not understand what this paragraph means, but alleges that the defendant, under the terms of the contracts could not have and has not repudiated any 1956 wheat crop insurance contracts with any of the parties plaintiff, all of which contracts are still in full force and effect, a fact that they recognized by filing acreage reports reporting their reseeded acreage.

Wherefore, the defendant prays that the suit of the plaintiffs be dismissed with prejudice, with costs to the defendant, and for such other and further relief as the court may feel just and equitable, and further that the defendant sets forth the following facts as a counter-claim.

I.

The defendant alleges that none of the insured plaintiffs have paid their 1956 premiums as stated in their complaint. Said premiums [16] are cal-

culated in accordance with paragraph 12 of the policy and are earned when the acreage is seeded although demands for payment are not made at that time. The premium note (Application No. E.) provides that if the premium is not paid by the discount date shown in the policy, which for Washington is June 30, the premium shall be increased by 10% and the unpaid premium or any balance thereof shall be subject to interest at 6% at the end of each 12 months period. Exhibit A enclosed herewith and by reference thereto made a part hereof shows the contract number and the amount of premium due from each plaintiff.

Wherefore, the defendant prays for the amount alleged in this counter-claim as shown in Exhibit A attached hereto, plus the 10% increase in the premium and 6% interest to date.

/s/ WILLIAM B. BANTZ,
United States Attorney,
/s/ ROBERT L. FRASER,
Assistant United States
Attorney.

Acknowledgment of Service Attached. [17]

Federal Crop Insurance Corporation
Department of Agriculture
Washington

September 27, 1956

I hereby certify that annexed is a true copy of documents and papers on file in the office of Federal Crop Insurance Corporation and in my cus-

tody relating to wheat crop insurance contract No. 91-009-6-209 between said Corporation and Harold Roberts, Route 1, Coulee City, Washington described as follows:

(1) Application for Crop Insurance on Wheat (For 1956 and Succeeding Crop Years), State and county code and contract number 91-009-6-209, signed by Harold Roberts, applicant, under date of September 12, 1955, accepted by Federal Crop Insurance Corporation on September 23, 1955, with copy of applicable wheat crop insurance policy issued by said Corporation attached, the accepted application and policy constituting the contract of insurance.

(2) Crop Insurance Acreage Report, 1956, State and county code and contract number 91-009-6-209, signed by Harold Roberts, insured, May 15, 1956.

(3) Statement of Debtor's Account, Wheat Contract 91-009-6-209, as of June 27, 1956.

In Witness Whereof, I have affixed the seal of Federal Crop Insurance Corporation and have signed my name hereto on the day and year first above written.

[Seal] /s/ ERNEST C. NEAS,
Assistant Secretary, Federal
Crop Insurance Corporation.

Form FCI-412

UNITED STATES DEPARTMENT OF AGRICULTURE
Federal Crop Insurance Corporation

APPLICATION FOR CROP INSURANCE ON Wheat

(For 195 6 and Succeeding Crop Years)

Mr.
Mrs. Harold Roberts
Miss
(NAME OF APPLICANT - PRINT)

91-009-6-209
(STATE AND COUNTY CODE AND CONTRACT NUMBER)

Rte. 1 Coulee City, Wn
(ADDRESS - PRINT)

Douglas (COUNTY) Wash. (STATE)

The undersigned applicant hereby applies to the Federal Crop Insurance Corporation (herein called the "Corporation") for crop insurance on his interest as landlord, owner-operator, tenant, or sharecropper in the above-mentioned crop (crops designated in the policy in case of multiple crop insurance) planted on acreage included in the crop insurance program for the county designated above, and for which a coverage is shown on the county actuarial table on file in the Corporation's office for the county (herein called "county office"). The insurance shall cover loss due to the unavoidable causes specified in the applicable policy issued by the Corporation and on file in the county office, the receipt of a copy of which is hereby acknowledged by the applicant. This application, when executed by a person as an individual, shall not cover interest(s) in a crop produced by a partnership.

This application, upon acceptance by the Corporation, and the policy shall constitute the contract. The contract shall, if this application is accepted, be in effect for the crop year specified above and shall continue in effect for each succeeding crop year until cancelled or terminated in accordance with the provisions of the policy. Except as otherwise provided in the policy, the acceptance of this application by the Corporation shall cancel, beginning with the above-specified crop year, any and all existing crop insurance contracts in the county between the parties hereto covering (1) the same crop if the application is for insurance on a single crop or (2) any one or more of the crops if the application is for multiple crop insurance.

For the first crop year of the contract the coverage(s) and premium rate(s) shall be those established by the Corporation for that crop year and shown on the county actuarial table on file in the county office. For each subsequent crop year the coverage(s) and premium rate(s) shall be those shown on the county actuarial table for that crop year and shall, together with any changes in the policy, be on file in the county office at least fifteen days prior to the applicable cancellation date.

Applicable only to Multiple Crop Insurance. The applicant does _____ (ENTER "NOT" WHERE APPLICABLE) elect to combine all insurance units into one combination unit. (Unless the word "not" is entered in the space provided, it is understood and agreed that the applicant shall have a combination unit for all purposes under the contract.)

– NOTE FOR PREMIUM –

The applicant promises to pay to the Corporation each crop year during which the contract is in effect the amount of the premium earned under the contract for such year as soon as such premium becomes due. He agrees that any amount of the premium which is unpaid on the day following the discount date shown in the policy shall be increased by ten percent and that thereafter, at the end of each 12 months' period, six percent simple interest shall attach to any premium balance which is unpaid.

9 12 (DATE) 195 5

Harold Roberts
(SIGNATURE OF APPLICANT)

(WITNESS TO APPLICANT'S SIGNATURE)

The undersigned co-signer is a surety for the payment of the premium note as it applies to the first crop year of the contract and is in no other way a party to the contract.

(NAME AND ADDRESS OF CO-SIGNER OF PREMIUM NOTE) (TYPE OR PRINT)

(SIGNATURE OF CO-SIGNER)

9-20 (DATE) 195 5

RECOMMENDATION FOR ACCEPTANCE

(CORPORATION REPRESENTATIVE)

ACCEPTED BY THE FEDERAL CROP INSURANCE CORPORATION BY

(AUTHORIZED REPRESENTATIVE)

9-21 (DATE) 195 5

COUNTY OFFICE ADDRESS

LOCATION OF FARM(S) OR HEADQUARTERS

BRANCH OFFICE COPY

19



1. Insurable wheat. The wheat to be insured shall be winter and spring wheat seeded for harvest as grain. If the insured seeds only a part of his wheat for harvest as grain in any year of the contract, he shall submit with his acreage report of wheat seeded a designation of any acreage of wheat seeded for any purpose other than harvest as grain. Upon approval of the Corporation, the acreage used in computing the premium and total coverage shall not include acreage so designated. However, any wheat threshed from such acreage shall be considered as wheat produced on the insured acreage in determining any loss under the contract. The contract shall not provide insurance for volunteer wheat, wheat seeded with flax or other small grains, vetch, Austrian winter peas, dry edible peas, or a type of wheat which the Corporation determines is not adapted to the area. However, in determining production, volunteer small grains, volunteer vetch, volunteer Austrian winter peas and volunteer dry edible peas growing with the seeded wheat crop, and small grains seeded in the growing wheat crop on acreage not released by the Corporation, shall be counted as wheat.

2. Insurable acreage. For each crop year of the contract, any acreage is insurable only if a coverage is shown therefor on the county actuarial table on the applicable calendar closing date for filing applications for that crop year, provided the farming practice followed on such acreage is one for which a coverage was established.

THE FEDERAL CROP INSURANCE CORPORATION, UNITED STATES DEPARTMENT OF AGRICULTURE



WHEAT CROP INSURANCE

IN CONSIDERATION of the representations and provisions in the application upon which this policy is issued, which application is made a part of the contract, and subject to the terms and conditions set forth or referred to herein, the Federal Crop Insurance Corporation (hereinafter designated as the Corporation) does hereby insure

This policy is a duplicate of the one referred to in your application for insurance. The spaces provided for entries and signature on this page need not be filled in as insurance becomes effective upon the acceptance of your application by the Corporation.

Manager

Policy number

54

County

State

(Hereinafter designated as the insured)

against unavoidable loss on his wheat crop due to drought, flood, hail, wind, frost, winter-kill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes as may be determined by the Board of Directors of the Corporation. (For irrigated acreage, also see section 31.)

In witness whereof, the Federal Crop Insurance Corporation has caused this policy to be issued

FEDERAL CROP INSURANCE CORPORATION

By

State Crop Insurance Director.

TERMS AND CONDITIONS

1. Kinds of wheat insured. The wheat to be insured shall be winter and spring wheat seeded for harvest as grain. If the insured seeds only a part of his wheat for harvest as grain in any year of the contract, he shall submit with his acreage report of wheat seeded a designation of any acreage of wheat seeded for any purpose other than harvest as grain. Upon approval of the Corporation, the acreage used in computing the premium and total coverage shall not include acreage so designated. However, any wheat threshed from such acreage shall be considered as wheat produced on the insured acreage in determining any loss under the contract. The contract shall not provide insurance for volunteer wheat, wheat seeded with flax or other small grains, vetch, Austrian winter peas, dry edible peas, or a type of wheat which the Corporation determines is not adapted to the area. However, in determining production, volunteer small grains, volunteer vetch, volunteer Austrian winter peas and volunteer dry edible peas growing with the seeded wheat crop, and small grains seeded in the growing wheat crop on acreage not released by the Corporation, shall be counted as wheat.

2. Insurable acreage. For each crop year of the contract, any acreage is insurable only if a coverage is shown therefor on the county actuarial table on the applicable calendar closing date for filing applications for that crop year, provided the farming practice followed on such acreage is one for which a coverage was established.

3. Responsibility of insured to report acreage and interest. (a) Prior to [illegible] after seeding wheat ([illegible] spring) each year, the insured shall submit to the Corporation, on a form approved by the Corporation, a report over his signature, of all acreage in the county seeded to wheat in which he has an interest at the time of seeding. This report shall show the acreage of wheat for each insurance unit and his interest in each at the time of seeding. If the insured does not have an insurable interest in wheat seeded in any year, the acreage report shall nevertheless be submitted promptly after the seeding of wheat is generally completed in the county. Any acreage report submitted by the insured shall be considered final and not subject to change by the insured. (b) If the insured fails to file an acreage report within 30 days after seeding of the applicable type of wheat (winter or spring) is generally completed in the county as determined by the Corporation, the Corporation may elect to determine that the insured acreage of that type of wheat is "zero." (c) Failure of the Corporation to request submission of such report or to send a personal representative to obtain the report shall not relieve the insured of the responsibility to make such report.

4. Insured acreage. The insured acreage with respect to each insurance unit shall be the acreage of wheat seeded for harvest as grain as reported by the insured or as determined by the Corporation, whichever the Corporation shall elect, except that insurance shall not attach with respect to (a) any acreage seeded to wheat which is destroyed (as defined in section 15) and on which it is practical to reseed to wheat, as determined by the Corporation, and such acreage is not reseeded to wheat, (b) any acreage initially seeded to wheat too late to expect a normal crop to be produced, as determined by the Corporation, (c) new ground acreage where the cancellation date is April 30 or June 30, and (d) any acreage seeded for harvest in a crop year for which cancellation of the contract becomes effective. (For irrigated acreage, also see section 31.) The Corporation reserves the right to limit the insured acreage on any farm to the wheat allotment or permitted acreage established under any act of Congress including the Agricultural Adjustment Act of 1938, as amended.

5. Insured interest. The insured interest in the wheat crop covered by the contract shall be the interest of the insured at the time of seeding as reported by the insured or as determined by the Corporation, whichever the Corporation shall elect. For the purpose of determining the amount of loss the insured interest shall not exceed the insured's interest at the time of loss or the beginning of harvest, whichever occurs first.

6. Coverage per acre. The coverage per acre established for the area in which the insured acreage is located shall be shown by practice(s) on the county actuarial table on file in the county office. The coverage per acre is progressive depending upon whether the acreage is (a) First Stage—released and seeded to a substitute crop, (b) Second Stage—not harvested and not seeded to a substitute crop, or (c) Third Stage—harvested.

7. Fixed price. The fixed price per bushel for the first crop year of the contract shall be the price established for that year by the Corporation and shall be shown on the county actuarial table on file in the county office at the time the application for insurance is submitted. For each subsequent crop year the fixed price shall be on file in the county office at least 15 days prior to the applicable cancellation date preceding the crop year for which such price applies. The fixed price shall be used to determine the cash equivalent of premiums and of any indemnities.

8. Insurance period. Insurance with respect to any insured acreage shall attach at the time the wheat is seeded. Insurance shall cease with respect to any portion of the wheat crop covered by the contract upon threshing (in California, 120 hours thereafter when combined and in sacks in the field) or removal from the field, whichever occurs first, but in no event shall the insurance remain in effect later than October 31 of each year, unless such time is extended in writing by the Corporation.

9. Life of contract, cancellation or termination thereof. (a) Subject to the provisions of this section, the contract shall be in effect for the first crop year specified on the application and shall continue in effect for each succeeding crop year until canceled by either the insured or the Corporation. Cancellation may be made by either party giving written notice to the other party on or before the applicable cancellation date preceding the seeding of the crop for which the cancellation is to become effective, *provided, however*, if any amount due the Corporation remains unpaid on such cancellation date, the time during which the Corporation may cancel shall be extended to the following closing date. The insured shall give such notice to the county or another office of the Corporation. The Corporation shall mail notice of cancellation to the insured's last known address and the mailing of such notice shall constitute notice to the insured. (b) If the insured cancels the contract, he shall not be eligible for crop insurance on wheat seeded or to be seeded in the county for harvest in the next calendar year unless subsequent to such cancellation he files an application for insurance on or before the cancellation date preceding such year. (c) Not applicable. (d) If the minimum participation requirement as established by the Corporation is not met for any year the contract shall continue in force only to the end of the crop year for which such requirement is not met, except that if the minimum participation requirement is met on or before the next succeeding applicable closing date the contract shall continue to be in force. (e) The contract shall terminate upon death or judicial declaration of incompetence of the insured, except that if such death or judicial declaration of incompetence occurs after the beginning of seeding of the wheat crop in any crop year but before the end of the insurance period for such year, the contract shall (1) cover any additional wheat seeded for the insured or his estate for that crop year, and (2) terminate at the end of such insurance period.

10. Changes in contract. The Corporation reserves the right to change the premium rate(s), insurance coverage(s), and other terms and provisions of the contract from year to year. Notice of such changes shall be mailed to the insured at least 15 days prior to the applicable cancellation date preceding the crop year for which such changes are to become effective. Failure of the insured to cancel the contract as provided in section 9 shall constitute his acceptance of any such changes. If no notice is mailed to the insured the terms and provisions of the contract for the prior year shall continue in force.

11. Causes of loss not insured against. The contract shall not cover loss of production caused by: (a) Failure to follow recognized good farming practices; (b) poor farming practices, including but not limited to the use of defective or unadapted seed, failure to plant a sufficient quantity of seed, failure properly to prepare the land for seeding or properly to seed, [illegible] harvest and thresh the insured crop (including unreasonable delay thereof); (c) overpasturage; (d) seeding another crop with the wheat or in the growing wheat crop; (e) seeding excessive acreage under abnormal conditions; (f) seeding wheat under conditions of immediate hazard; (g) inability to obtain labor, seed, fertilizer, machinery, repairs, or insect poison; (h) breakdown of machinery, or failure of equipment due to mechanical defects; (i) neglect or malfeasance of the insured or of any person in his household or employment or connected with the farm as tenant or wage hand; (j) domestic animals or poultry; or (k) theft. (For irrigated acreage, also see section 31.)

12. Amount of annual premium. (a) The premium rate per acre will be established by the Corporation for the coverage and rate area in which the insured acreage is located and will be shown by practice(s) on the county actuarial table on file in the county office. The annual premium for each insurance unit under the contract will be based upon (1) the insured acreage of wheat, (2) the applicable premium rate(s), and (3) the insured interest in the crop at the time of seeding. There will be a reduction in the annual premium for each insurance unit of one percent in cases where the insured acreage on the insurance unit is as much as 25 acres and does not exceed 74.9 acres, and an additional one percent reduction for each additional 50 acres or fraction thereof on the insurance unit. However, the total reduction shall not exceed 20 percent. The annual premium for the contract shall be the total of the premiums computed for the insured for all insurance units covered by the contract. The annual premium with respect to any insured acreage shall be regarded as earned when the wheat crop on such acreage is seeded. (b) The insured's annual premium for any year may be reduced 25 percent if he has had seven consecutively insured wheat crops (immediately preceding the current crop year) without a loss for which an indemnity was paid. (See section 30 for definition of "Consecutively insured crops.") Whether or not the insured is eligible for the above premium reduction, his annual premium may be reduced in lieu of the above in any year by not to exceed 50 percent if it is determined by the Corporation that the accumulated balance (expressed in bushels) of premiums over indemnities on consecutively insured wheat crops exceeds his total coverage (computed on a harvested acreage basis). Nothing in this paragraph (b) shall create in the insured any right to a reduced premium. (c) A discount of 5 percent shall be allowed on any earned annual premium which is paid in full on or before the applicable discount date shown in section 32, if the insured has submitted to the Corporation at the county office his winter wheat acreage report on or before December 31 of the crop year and his spring wheat acreage report on or before June 30 of the crop year, except that for California the acreage report for all wheat shall be submitted on or before March 31 of the crop year. (d) Any premium note not paid at maturity shall bear interest computed not on a per annum basis but as follows: Three percent on the principal amount not paid on or before October 31 following the maturity date, and an additional 1 percent on the principal amount unpaid at the end of each two calendar-month period thereafter.

13. Manner of payment of premium. (a) Payment on any annual premium shall be made by means of cash or by check, money order, postal note, or bank draft payable to the order of the Treasurer of the United States. All checks and drafts will be accepted subject to collection and payment tendered shall not be regarded as paid unless collection is made. (b) Any unpaid amount of any annual premium plus any interest due may be deducted (either before or after the date of maturity) from any indemnity payable by the Corporation, from the proceeds of any commodity loan to the insured, and from any payment made to the insured under the Soil Conservation and Domestic Allotment Act, as amended, or any other act of Congress or program administered by the United States Department of Agriculture. There shall be no refund of any annual premium overpayment of less than $1.00 unless written request for such refund is received by the Corporation within 1 year after the payment thereof.

14. Notice of loss or damage. (a) If any damage occurs to the insured crop during the growing season and a loss under the contract is probable, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office promptly after such damage. (b) If a loss under the contract is sustained, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office within 15 days after threshing is completed or by October 31, whichever is earlier. (c) The Corporation reserves the right to reject any claim for indemnity if either of the notices required by this section is not given.

15. Released acreage. Any acreage of the insured wheat crop which is destroyed after it is too late to reseed to wheat may be released by the Corporation to be put to another use. Any acreage shall be considered destroyed if it is damaged to the extent that farmers generally in the area where the land is located would not further care for the crop or harvest any portion thereof. (For production to be counted, see section 19.) No insured acreage may be planted to a substitute crop or put to another use until the Corporation releases such acreage. Proper measures shall be taken to protect the crop from further damage on any insured acreage if the crop has been damaged but the acreage has not been released by the Corporation. Where released acreage is not put to another use, or is reseeded to wheat, and wheat is harvested from such acreage, the release may be disregarded by the Corporation. There shall be no abandonment of any crop or portion thereof to the Corporation.

16. Time of loss. Any loss shall be deemed to have occurred at the end of the insurance period, unless the entire wheat crop on the insurance unit was destroyed earlier, in which event the loss shall be deemed to have occurred on the date of such damage as determined by the Corporation.

17. Proof of loss. If a loss is claimed, the insured shall submit to the Corporation, on a Corporation form entitled "Statement in Proof of Loss," such information regarding the manner and extent of the loss as may be required by the Corporation. The statement in proof of loss shall be submitted not later than 60 days after the time of loss, unless the time for submitting the claim is extended in writing by the Corporation. It shall be a condition precedent to any liability under the contract that the insured establish the production of wheat on the insurance unit, the amount of any loss for which claim is made, and that such loss has been directly caused by one or more of the hazards insured against by the contract during the insurance period for the crop year for which the loss is claimed, and that the insured further establish that the loss has not arisen from or been caused by either directly or indirectly, any of the causes of loss not insured against by the contract. If a loss is claimed, any wheat acreage which is not to be harvested shall be left intact until the Corporation makes an inspection.

18. Insurance unit. Losses shall be determined separately for each insurance unit except as provided in section 19 (b). An insurance unit consists of (a) all the insurable acreage of wheat in the county in which the insured has 100 percent interest in the crop at the time of seeding, or (b) all the insurable acreage of wheat in the county owned by one person which is operated by the insured as a share tenant, or (c) all the insurable acreage of wheat in the county which is owned by the insured and is rented to one share tenant at the time of seeding. However, an applicant or an insured may elect to combine all insurance units into one combination unit, or to change from a combination unit by giving written notice to the Corporation at the county office by the closing date preceding the crop year the election is to become effective. For any crop year of the contract, acreage shall be considered to be located in the county if a coverage is shown therefor on the county actuarial table. Land rented for cash or for a fixed commodity payment shall be considered as owned by the lessee.

19. Amount of loss. (a) The amount of loss with respect to any insurance unit shall be determined by (1) multiplying the seeded acreage (exclusive of any acreage to which insurance did not attach) by the applicable bushel coverage per acre, (2) subtracting therefrom the total production to be counted for the seeded acreage, and (3) multiplying the remainder by the insured interest in such unit. However, if the seeded acreage on the insurance unit exceeds the insured acreage on the insurance unit, or if the premium computed for the seeded acreage is more than the premium computed for the acreage and the interest as approved by the Corporation on the acreage report, the amount of loss so determined shall be reduced. This reduction shall be made on the basis of the ratio of the insured acreage to the seeded acreage except that the Corporation may elect to make the reduction on the basis of the ratio of the premium computed for the acreage and interest as approved by the Corporation on the acreage report to the premium computed for the seeded acreage. The total production for an insurance unit shall include all production determined in accordance with the following schedule:

PRODUCTION SCHEDULE

Acreage classification	*Stage of Coverage to be Used*	*Production to be Counted*
1. Acreage released by the Corporation and planted to a substitute crop.	FIRST	That portion of the appraised production which is in excess of the coverage for such acreage.
2. Acreage not harvested and not planted to a substitute crop.	SECOND	That portion of the appraised production which is in excess of the difference between the coverages for such acreage in the second and third stages.
3. Acreage on which wheat is threshed or otherwise harvested as grain (exclusive of any acreage on which the production is eligible for an adjustment for quality).	THIRD	Actual or appraised production not including wheat in a mixture with other small grains which are seeded in the growing wheat crop on released acreage.
4. Acreage from which threshed wheat as determined by the Corporation (1) does not grade No. 3 or better in accordance with Official Grain Standards of the United States for wheat, because of the quality of the wheat, and cannot be made to grade No. 3 if properly handled and (2) has a value per bushel which is less than the lower of the fixed price or the Commodity Credit Corporation county loan rate for No. 3 wheat.		The number of bushels obtained by (1) multiplying the bushels of such threshed wheat by the value per bushel as determined by the Corporation, and (2) dividing the result thus obtained by the lower of the fixed price or the Commodity Credit Corporation county loan rate for No. 3 wheat.
5. Acreage put to another use without being released by the Corporation.		Appraised production but not less than the third stage coverage for such acreage.
6. Acreage with reduced yield due solely to any cause(s) not insured against.		[1] Appraised number of bushels by which production has been reduced but not less than the third stage coverage for such acreage, minus any wheat harvested.
7. Acreage with reduced yield due partially to a cause(s) not insured against and partially to a cause(s) insured against.	Depends on use of acreage	[1] Appraised number of bushels by which production has been reduced because of any cause(s) not insured against.

[1] This production is in addition to any production for such acreage counted under other items of this schedule.

(b) If the production from an insurance unit is commingled with the production from another insurance unit or with production from uninsured acreage and the insured fails to keep records satisfactory to the Corporation of the acreage involved and the production from each, the Corporation may (1) deny liability with respect to all insurance units involved for the crop year and declare the premium on such units forfeited by the insured, or (2) allocate all of the commingled production among the insurance unit(s) involved in such manner as it determines appropriate.

20. Payment of indemnity. (a) Any indemnity will be payable by check within 30 days after satisfactory proof of loss is approved by the Corporation, but if payment is delayed for any reason, the Corporation shall not be liable for interest or damage on account of such delay. (b) Indemnities shall be subject to all provisions of the contract, including the right of the Corporation to deduct from any indemnity the unpaid amount of any obligation of the insured to the Corporation. (c) Any indemnity payable under a contract shall be paid to the insured or such other person as may be entitled to the benefits under the provisions of the contract, notwithstanding any attachment, garnishment, receivership, trustee process, judgment, levy, equity, or bankruptcy, directed against the insured or such other person, or against any indemnity alleged to be due to such person; nor shall the Corporation or any officer, employee, or representative thereof, be a proper party to any suit or action with reference to such indemnity, nor be bound by any judgment, order, or decree rendered or entered therein. Nothing herein contained shall excuse any person entitled to the benefits of the contract from full compliance with, or performance of, any lawful judgment, order or decree with respect to the disposition of any sums paid thereunder as an indemnity. (d) If a check issued in payment of an indemnity is returned undeliverable at the last known address of the payee, and if such payee or other person entitled to the indemnity makes no claim for payment within 2 years after the issuance of the check, such claim shall not thereafter be payable, except with the consent of the Corporation.

21. Transfer of interest. (a) If the insured transfers all or a part of his insured interest in a wheat crop before the beginning of harvest and the time of loss, the transferee may obtain the benefits of the contract on the transferred interest by within 15 days after the date of transfer, unless such time is extended in writing by the Corporation, (1) submitting to the county office such information concerning the transfer as may be required by the Corporation and (2) making arrangements satisfactory to the Corporation for the payment of any unpaid premium on the interest transferred. In any case, the transferee and transferor shall be jointly and severally liable for the amount of premium on the interest transferred. Any transfer shall be subject to any collateral assignment made by the original insured in accordance with section 25. However, the Corporation shall not be liable for a greater amount of indemnity in connection with the insured crop than if the transfer had not taken place. (b) If a transfer is effected in accordance with paragraph (a) above, the contract of the transferor shall cover the interest so transferred only to the end of the insurance period for the crop year during which the transfer is made.

22. Determination of person to whom indemnity shall be paid. If the insured dies, is judically declared incompetent or disappears after the seeding of the wheat crop in any year any indemnity which is, or becomes part of his estate, shall be paid to the legal representative of the estate. Should no such representative be qualified, the Corporation may pay the indemnity to the person(s) it determines to be beneficially entitled thereto or to any one or more of such persons on behalf of all such persons, or may withhold payment until a legal representative of the estate is qualified. In such cases, and in any other case where an indemnity is claimed by a person(s) other than the original insured or diverse interests appear with respect to any insurance unit, the determination of the Corporation as to the existence or nonexistence of a circumstance in the event of which payment may be made and of the person(s) to whom such payment shall be made shall be final and conclusive. Payment of an indemnity shall constitute a complete discharge of the Corporation's obligations with respect to the loss for which such indemnity is paid and shall be a bar to recovery by any other person(s).

23. Other insurance. (a) If the insured has or acquires any other insurance against substantially all the risks that are insured against by the Corporation under the contract, regardless of whether such other insurance is valid or collectible, the liability of the Corporation shall not be greater than its share would be if the amount of its obligations were divided equally between the Corporation and such other insurer. (b) In any case where the insured is paid by another Government agency for damage to the wheat crop, the Corporation reserves the right to deduct from any indemnity the amount paid by such other agency.

24. Subrogation. The insured shall assign to the Corporation all rights of recovery against any person(s) for loss or damage to the extent that payment therefor is made by the Corporation, and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

25. Collateral assignment. The original insured may assign his right to an indemnity for any year under the contract by executing a Corporation form entitled "Collateral Assignment," and upon approval thereof by the Corporation the interest of the assignee will be recognized and the assignee shall have the right to submit the loss notices and forms as required by the contract if the insured neglects or refuses to take such action.

26. Records and access to farm. For the purpose of enabling the Corporation to determine any loss that may have occurred under the contract, the insured shall keep or cause to be kept, for 2 years after the time of loss, records of the harvesting, storage, shipment, sale or other disposition, of all wheat produced on each insurance unit covered by the contract, and on any uninsured acreage in the county in which he has an interest. As often as may be reasonably required, any person(s) designated by the Corporation shall have access to such records and the farm(s) for purposes related to the contract.

27. Voidance of contract. The Corporation may void the contract and declare the premium(s) forfeited without waiving any right or remedy including the right to collect the amount of the premium note, if (a) at any time, either before or after loss, the insured has concealed or misrepresented any material fact or committed any fraud relating to the contract, or the subject thereof, or (b) the insured shall neglect to use all reasonable means to produce, care for, or save the wheat crop whether before or after damage has occurred, or (c) the insured fails to give any notice, or otherwise fails to comply with the terms of the contract, including the premium note, at the time and in the manner prescribed.

28. Modification of contract. No notice to any representative of the Corporation or its knowledge possessed by any such representative or by any other persons shall be held to effect a waiver of or change in any part of the contract, or to estop the Corporation from asserting any right or power under such contract, nor shall the terms of such contract be waived or changed except as authorized in writing by a duly authorized officer or representative of the Corporation; nor shall any provision or condition of the contract or any forfeiture be held to be waived by any delay or omission by the Corporation in exercising its rights and powers thereunder or by any requirement, act, or proceeding on the part of the Corporation or of its representatives relating to appraisal or to any examination herein provided for.

29. General. (a) In addition to the terms and provisions in the application and policy, the Wheat Crop Insurance Regulations for Continuous Contracts in effect for the crop year involved shall govern with respect to (1) minimum participation requirements, (2) closing dates for filing applications for insurance and premium note payments, and (4) creditors. (b) Copies of the regulations and forms referred to in this policy are available at the county office. (c) When the cancellation date or the closing date for filing applications falls on a Sunday or other day on which the county office is not officially open for business, such date shall be extended to the next business day.

30. Meaning of terms. (a) "Consecutively insured crops" means the wheat crops insured in consecutive years during which insurance was available but excluding the 1945 crop if no application for insurance was submitted. Failure to apply for insurance in any year, except 1945, when insurance is offered in the county in which the insured's farm is located, shall break the insured's continuity of consecutively insured crops prior to such year, even though insurance may not be provided in the county during such year because of failure to meet the minimum participation requirement: *Provided*, however, That failure to apply for insurance for any year will not break the continuity of consecutively insured crops, if (1) the failure to apply for insurance was due to service in the active military or naval service of the United States, or (2) the insured establishes to the satisfaction of the Corporation that failure to apply for insurance for any crop year was due to the fact that wheat was not seeded in that year. (b) "Contract" means the accepted application for insurance and this policy. (c) "County Actuarial Table" means the form(s) and related materials (including the crop insurance maps) which are approved annually by the Corporation and show the price per bushel, the coverages per acre and the premium rates per acre applicable in the county. (d) "County office" means the office of the County Production and Marketing Administration in the county unless another office is specified by the Corporation. (e) "Crop year" means the period within which the wheat crop is seeded and normally harvested, and shall be designated by reference to the calendar year in which the crop is normally harvested. (f) "Harvest" means the mechanical severance from the land of matured wheat for threshing where the wheat crop has not been destroyed. (g) "New ground acreage" means any acreage which has not been planted to a crop in any one of the previous 3 crop years, except (1) acreage in tame hay or rotation pasture during the previous crop year, and (2) (applicable only in Montana) any acreage which has been properly summer fallowed the previous crop year in accordance with good farming practices in the area, shall not be considered new ground acreage. (h) "Person" means an individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, and, wherever applicable, a State; a political subdivision of a State, or any agency thereof. (i) "Substitute crop" means any crop except lespedeza, annual legumes used for a green manure crop or for a cover crop and not harvested, biennial and perennial legumes and perennial grasses, planted on released acreage before harvest of wheat becomes general in the county (in California, before wheat generally in the area is mature) as determined by the Corporation. Biennial and perennial legumes and perennial grasses seeded with the wheat or in the growing wheat crop shall not be considered a substitute crop. If other small grains are seeded in a growing wheat crop on released acreage, the crop of mixed wheat and other grains shall be considered a substitute crop. (j) "Tenant" means a person who rents land from another person for a share of the wheat crop or proceeds therefrom produced on such land.

Irrigated acreage. (a) In addition to the provisions of section 4, where insurance is written on the basis of irrigated coverage the following provisions shall apply: (1) In counties where part of the wheat is normally irrigated and a part is not normally irrigated the acreage of wheat which shall be insured on the basis of irrigated coverage in any year shall not exceed the smaller of (i) that acreage which could be irrrigated adequately with the facilities available, taking into consideration the amount of water required to irrigate the acreage of all irrigated crops on the farm, or (ii) that acreage on which one irrigation is carried out in accordance with good farming practices determined by the Corporation, either before the crop is seeded or during the growing season. Any insurable acreage of wheat on which the above irrigation requirements are not met will be insured on the basis of non-irrigated coverage. (2) Insurance shall not attach with respect to acreage seeded to wheat the first year after being leveled. (b) In addition to the causes of loss insured against shown on the first page of this policy the contract shall cover loss in production due to failure of the water supply from natural causes that could not be foreseen and prevented by the insured, including (1) lowering of the water level in pump wells adequate at the beginning of the growing season to the extent that further deepening the well or drilling a new well would be necessary to obtain an adequate supply of water, (2) failure of public power used for pumping or failure of irrigation district or water company to deliver water where such failure is not within the control of the insured, and (3) the collapse of casing in wells. (c) In addition to the causes of loss not insured against shown in section 11, the contract shall not cover loss in production caused by (1) failure properly to apply adequate irrigation water to wheat when needed and in accordance with recognized good farming practices for the area, (2) failure to provide adequate casing or properly adjust the pumping equipment in the event of a lowering of the water level in pump wells when such adjustment can be made without deepening the well, (3) failure properly to apply irrigation water to wheat in proportion to the need of the crop and the amount of water available for all irrigated crops, and (4) shortage of irrigation water on any farm where the Corporation determines that the total acreage of all irrigated crops on the farm is in excess of that which could be irrigated properly with the facilities available and with the supply of irrigation water which could be reasonably expected.

32. **Date table.** For each year of the contract the cancellation date, discount date, and maturity date are as follows:

State and County	Cancellation Date[1]	Discount Date	Maturity Date
California	June 30	Mar. 31	June 30
Colorado	Apr. 30	Feb. 28	June 30
Idaho	June 30	June 30	July 31
Illinois	June 30	Feb. 28	June 30
Indiana	June 30	Feb. 28	June 30
Kansas	Apr. 30	Feb. 28	June 15
Maryland	June 30	Feb. 28	June 30
Michigan	June 30	Feb. 28	June 30
Minnesota	Dec. 31	June 30	July 31
Missouri	June 30	Feb. 28	June 30
Montana:			
Blaine	June 30	June 30	July 31
Cascade	June 30	June 30	July 31
Chouteau	June 30	June 30	July 31
Fergus	June 30	June 30	July 31
Hill	June 30	June 30	July 31
Judith Basin	June 30	June 30	July 31
Liberty	June 30	June 30	July 31
Petroleum	June 30	June 30	July 31
Pondera	June 30	June 30	July 31
Teton	June 30	June 30	July 31
All others	Dec. 31	June 30	July 31
Nebraska	Apr. 30	Feb. 28	June 30
New Mexico	Apr. 30	Feb. 28	June 30
New York	June 30	Feb. 28	June 30
North Dakota	Dec. 31	June 30	July 31
Ohio	June 30	Feb. 28	June 30
Oklahoma	Apr. 30	Feb. 28	June 15
Oregon	June 30	June 30	July 31
Pennsylvania	June 30	Feb. 28	June 30
South Dakota:			
Jones	Apr. 30	June 30	July 31
Lyman	Apr. 30	June 30	July 31
Meade	Apr. 30	June 30	July 31
Mellette	Apr. 30	June 30	July 31
Tripp	Apr. 30	June 30	July 31
All others	Dec. 31	June 30	July 31
Texas	Apr. 30	Feb. 28	June 15
Utah	June 30	June 30	July 31
Washington	June 30	June 30	July 31
Wyoming	Apr. 30	Feb. 28	June 30

[1] The cancellation date for any year is the applicable date preceding the calendar year in which the wheat is to be harvested.

U. S. GOVERNMENT PRINTING OFFICE : 1954 O - 295630

THE FEDERAL CROP INSURANCE CORPORATION



UNITED STATES DEPARTMENT OF AGRICULTURE

Wheat Crop Insurance Policy

CONTINUOUS CONTRACT

Form FCI-41Y
(Rev. 3-52)

UNITED STATES DEPARTMENT OF AGRICULTURE
FEDERAL CROP INSURANCE CORPORATION

Form Approved
Budget Bureau No.

22
22

CROP INSURANCE ACREAGE REPORT

195 6
(Crop Year)

Harold Roberts
(Name of Insured or Applicant - Type or Print)

Wheat
(Crop)

91-009 - 6-209
(State and county code and contract number)

Coulee City, Washington
(Address of Insured or Applicant - Type or Print)

(Interests covered or level of insurance)

Douglas
(Name of County)

(SEE BACK OF THIS FORM FOR INSTRUCTIONS)

TO FEDERAL CROP INSURANCE CORPORATION:

I submit the following information in connection with my above-identified crop insurance contract, or application for insurance, for the crop year indicated above. This is a report of _____

planted _____ acres.
(Enter "Planted" or "Intended")

INFORMATION TO BE ENTERED BY INSURED OR APPLICANT						INFORMATION TO BE ENTERED IN OFFICE					
Name and Location or the Legal Description of the Farm (1)	Name of Other Person(s) Sharing in Crop or Farm (2)	Tenure of Person Listed in Col. (2) (3)	Practice, Type or Class (4)	Acres of Insured Crop (5)	Insured Share (6)	Area No. (7)	Premium Rate Per Acre (8)	Gross Premium (Cols. 5x8x6) (9)	(10)	(11)	Ins. Unit Nos. (12)
35N-17-24-26			OS SP	10.0	all	2	1.13		-		1
31½-1-24-26			OS SP	154.0	all	3	.94		-		1
34-16-24-26	Hypothesk Land Company	L	OS SP	155.0	3/4	3	.94		-		2

Total Unit #1 - 194.0 acres

CERTIFICATION

I certify that the information in the heading and in columns 1 through 6 above is correct and complete and represents my entire interest, if insured, in the insured crop in the county and that of all sharecroppers and share tenants who share with me in the crop and whose interests are insured under my contract. If this is a report of intended acreage it is understood and I agree that unless I file a planted acreage report within 15 days after the insured crop is planted, this report will be my acreage report.

Harold Roberts — May 15, 195 6
(Signature of Insured) (Date)

I certify that to the best of my knowledge and belief the data on this report are correct and complete and that this form has been prepared in accordance with existing procedure.

_____ 195 _____ — _____ — 5 Jun 195 4
(Signature of Person Assisting Insured) (Date) (Signature of Corporate Representative) (Date)

U. S. GOVERNMENT PRINTING OFFICE: 1952 - 0-[illegible]

A. Total Premium	$
B. Premium Reduction ____ %	$
C. Reduced Premium (A-B)	$

D. Accumulated Premium Balance	E. Maximum Coverage	F. F Yrs. No Loss

BRANCH OFFICE COPY

W.M.

16

United States Department of Agriculture
Federal Crop Insurance Corporation

STATEMENT OF DEBTOR'S ACCOUNT

Harold Roberts Wheat Contract 91-009-6-209

Date	Particulars	Debit	Credit	Balance
1956	Discounted Wheat Premium	$299.24		$299.24

On November 30, 1956, 10% increase will be attached to any amount of the discounted premium left unpaid, and at the end of each 12 months period thereafter six per cent simple interest will attach to any amount of the premium remaining unpaid.

I hereby certify that the foregoing is a true and correct copy of the account maintained by the Federal Crop Insurance Corporation for the above-named insured who is, as of this date, indebted to the said Corporation for the amount as indicated by the final entry in the "Balance" column as shown above plus interest as described.

Date: June 27, 1956.

/s/ J. FRANCIS BUCK,
Branch Manager. [23]

[Endorsed]: Filed November 21, 1956.

[Title of District Court and Cause.]

SECOND AMENDED ANSWER AND COUNTER-CLAIM

Comes Now the defendant, The United States, by

its attorneys, William B. Bantz, United States Attorney for the Eastern District of Washington, and Robert L. Fraser, Assistant United States Attorney for said District, and for answer to the complaint filed herein admits, denies and alleges:

I.

Admits paragraph I of the plaintiffs' complaint with the exception that the defendant denies that it had issued policies of insurance to the parties plaintiff named as follows: Theodore B. Rice, E. G. Banscom, Frank Miller, Claude Miller, Teressa M. Davis, Geo. Jordan & Sons, Dale Leander, Clarence Adams.

II.

Admits paragraphs II, III, IV, V, VI, and VII of the plaintiffs' complaint.

III.

Denies paragraph VIII of the plaintiffs' complaint and alleges that a meeting of wheat producers in St. Andrews, Washington, on [26] April 9, 1956, Creighton Lawson, Washington State Director for defendant, informed those present that if claims for loss of 1956 wheat production were made at that time, such claims, in his opinion, would be rejected, and that he was authorized to speak for the Corporation; and said statement was in accord with provisions of the act and the wheat crop insurance contracts.

IV.

Denies paragraph IX except that defendant is without knowledge or information sufficient to form

a belief as to the truth of the averment that the cost of reseeding wheat was $6.50 per acre; and alleges further that parties plaintiff have reseeded an aggregate of 16,003.1 acres according to their own certified wheat crop insurance acreage reports filed by them with the defendant pursuant to Section 3 of their policies of insurance.

Denies paragraph X of the plaintiffs' complaint by reason of the fact that the defendant does not understand what this paragraph means; but alleges that the defendant, under the terms of the contracts could not have and has not repudiated any 1956 wheat crop insurance contracts with any of the parties plaintiff, all of which contracts are still in full force and effect, a fact that they recognized by filing acreage reports reporting their reseeded acreage. Further, all plaintiffs other than those enumerated in paragraph I of the defendant's Counter Claim set forth herein below have paid the 1956 premium to the Federal Crop Insurance Corporation by way of further recognizing that said contracts are still in full force and effect.

For Further Answer and Counter-Claim the defendant sets forth the following facts:

I.

The defendant alleges that plaintiff, J. E. Thoren, Contract No. 91-009-0-107, is presently indebted to the defendant for [27] the 1956 insurance premium in the sum of $154.07, which includes the 10% increase as explained in this paragraph below. Further, that plaintiff, George A. Murison, Contract No.

9-009-6-310 (after setoffs) is indebted to the defendant for the 1956 insurance premium in the amount of $263.67, which includes the 10% increase as set out in this paragraph below.

Said premiums are calculated in accordance with paragraph 12 of the policy and are earned when the acreage is seeded, although demands for payment are not made at that time. The premium note (Applicant No. E.) provides that if the premium is not paid by the discount date shown in the policy, which for Washington is June 30, the premium shall be increased by 10% and the unpaid premium or any balance thereof shall be subject to interest at 6% at the end of each 12-month period.

Wherefore, the defendant prays for judgment against plaintiff, J. E. Thoren, for the insurance premium for 1956 in the sum of $154.07, plus 6% interest until paid and against plaintiff, George A. Murison, for the insurance premium for 1956 in the sum of $263.67, plus 6% interest until paid. This defendant further prays for dismissal of the suit of the plaintiffs with prejudice, with costs to the defendant, and for such other and further relief as the court may deem just and equitable.

/s/ WILLIAM B. BANTZ,
United States Attorney,

/s/ ROBERT L. FRASER,
Assistant Attorney. [28]

Certificate of Service by Mail Attached. [29]

[Endorsed]: Filed March 20, 1957.

[Title of District Court and Cause.]

REPLY TO SECOND AMENDED ANSWER AND COUNTER-CLAIM

Comes now the plaintiffs and in reply to the Second Amended Answer and Counter-Claim, admits, denies and alleges as follows:

I.

Plaintiffs deny each and every allegation in the Answer where such denial is not inconsistent with the allegations of plaintiffs' complaint.

II.

In reply to the second answer and counter-claim, plaintiffs deny each and every allegation therein contained.

Dated this 26th day of March, 1957.

KIMBALL & CLARK,
/s/ By NED W. KIMBALL,
Attorneys for Plaintiffs. [30]

Acknowledgment of Service Attached.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiffs by this amended complaint and for a cause of action against the defendants, complain and allege as follows:

I.

That the United States District Court has jurisdiction of this matter under and by virtue of Title 7, U.S.C.A., Paragraph 1508, sub-section (c), the same being the statutory statement of jurisdiction.

II.

That all of the above named plaintiffs are farmers farming lands in Douglas County, Washington, and all are holders of policies of crop insurance issued by defendant.

III.

That the defendant is a government corporation established under the Department of Agriculture and does business in Douglas County, Washington, through agents duly appointed by said Corporation.

IV.

That each of the above named plaintiffs seeded winter wheat in the late summer of 1955, which said winter wheat was found to be a total loss in the Spring of 1956 when the snow melted off the land.

V.

That the insurance policy, in the insuring clause, reads as follows:

"In consideration of the representations and provisions in the application upon which this policy is issued, which application is made a part of the contract, and subject to the terms and conditions set forth or referred to herein, the Federal Crop Insurance Corporation (hereinafter designated as the Corporation) does hereby insure * * * (Hereinafter designated as the insured) against unavoidable loss on his wheat crop due to drought, flood, hail, wind, frost, winter-kill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes as may be determined by the Board of Directors of the Corporation."

VI.

That paragraph entitled "8. Insurance period" of said insurance policy reads as follows:

"Insurance with respect to any insured acreage shall attach at the time the wheat is [32] seeded * * *.

VII.

That paragraph entitled "16. Time of Loss." of said insurance policy reads as follows:

"Any loss shall be deemed to have occurred at the end of the insurance period, unless the entire wheat crop on the insurance unit was destroyed earlier, in which event the loss shall be deemed to have occurred on the date of such damage as determined by the Corporation."

VIII.

That paragraph entitled "6. Coverage per acre." reads as follows:

"The coverage per acre established for the area in which the insured acreage is located shall be shown by practice(s) on the county actuarial table on file in the county office. The coverage per acre is progressive depending upon whether the acreage is (a) First Stage—released and seeded to a substitute crop, (b) Second Stage—not harvested and not seeded to a substitute crop, or (c) Third Stage—harvested."

IX.

That on April 9, 1956, after it was determined that the seeded crop was a total loss, the plaintiffs, at a meeting at St. Andrews, Washington, received information from one Creighton Lawson, Washington State Director of the defendant Corporation, that no claims would be paid to the plaintiffs for the loss sustained to the 1956 wheat crop if plaintiffs made claims under the Sections of the policy quoted herein.

X.

That as a result of the repudiation of the contract by the defendant, plaintiffs, in order to mitigate their damage, were forced to reseed the acreage on which the winter wheat crop had been lost at a cost of $6.50 per acre, and that plaintiffs lost crop on and reseeded approximately 40,000 acres, more or less.

XI.

That, depending on the yield of the 1956 crop [33] as reseeded, the above mentioned repudiation of the contract by defendant may result in further damage to the plaintiffs in an amount equal to the differ-

ence between the actual amount harvested and the insured amount of wheat and that in order to perfectly protect the plaintiffs the Court should direct that the insurance be reinstated.

Wherefore, Plaintiffs pray for damage in an amount equal to the sum determined by multiplying the number of insured acres reseeded by $6.50 per acre plus interest; for judgment reinstating the insurance contract; for their costs and disbursements herein expended; and for such other and further relief as to the Court may seem just and equitable.

KIMBALL & CLARK,
/s/ By NED W. KIMBALL,
Attorneys for Plaintiffs.

Consent to file Amended Complaint without leave of Court.

/s/ ROBERT L. FRASER,
Assistant Attorney.

Duly Verified.

[Endorsed]: Filed September 23, 1957. [34]

[Title of District Court and Cause.]

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes Now the defendant, represented by William B. Bantz, United States Attorney for the Eastern District of Washington, and Robert L. Fraser, Assistant United States Attorney, and moves the Court as follows:

I.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the above entitled action because said cause of action fails to state a claim against defendant upon which relief may be granted;

II.

Or in the alternative, pursuant to Federal Rules of Civil Procedure, Rule 56(b), to enter summary judgment for this defendant on the grounds that there are no issues of any material fact in said cause of action and that the defendant is entitled to a judgment as a matter of law as appears from the amended complaint on file herein, the affidavit and exhibits attached to this motion, incorporated within it, and made a part of this motion, and all the files and records of the above entitled case.

/s/ WILLIAM B. BANTZ,
United States Attorney,
/s/ ROBERT L. FRASER,
Assistant Attorney. [35]

State of Washington,
County of Spokane—ss.

Creighton F. Lawson, being first duly sworn on oath deposes and says:

Your affiant states that he is the Washington State Director for the Federal Crop Insurance Corporation and that your affiant's duties in the main consist of administration of crop insurance matters in Oregon, Washington, Idaho and Utah; super-

vision of salesmen, loss adjusters, agents and state office personnel.

Your affiant further states that the Federal Crop Insurance Corporation is a United States Government agency set up by an act of Congress, which is reflected in Title 7 of the United States Code and also the Federal Register.

Your affiant states that he was furnished a copy of the amended complaint filed on September 23, 1957 in cause No. 1435, Harold Roberts, et al. v. The Federal Crop Insurance Corporation, a Government corporation, and personally examined the records reflecting contracts of insurance with reference to each of the plaintiffs listed.

Your affiant states that all plaintiffs listed in the amended complaint referred to have contracts of insurance with the Federal Crop Insurance Corporation, a government agency, with the exception that your affiant could not locate any contract for Theodore B. Rice, individually, or E. G. Branscom, individually, although your affiant discovered that Rice Brothers, by T. B. Rice had a contract of insurance and Branscom & Sons, by A. B. Branscom had a contract of insurance.

Your affiant states that all contracts of insurance were in full force and effect during the time the damage was alleged to have occurred as set out in plaintiff's complaint.

Your affiant further states that each of the individual plaintiffs having contracts of insurance was

furnished with a copy of the wheat [36] crop insurance policy, a copy of which is attached to this affidavit as Exhibit A, and constitutes the contractual agreement between the Federal Crop Insurance Corporation, a government agency, and the individual plaintiffs.

Paragraph 17 of Exhibit A, among other things, states:

> "If a loss is claimed, the insured shall submit to the Corporation, on a Corporation form entitled 'Statement in Proof of Loss', such information regarding the manner and extent of the loss as may be required by the Corporation. The statement in proof of loss shall be submitted not later than 60 days after the time of loss. * * * It shall be a condition precedent to any liability under the contract that the insured establish the production of wheat on the insurance unit, the amount of any loss for which claim is made * * * "

The proof of loss form referred to in paragraph 17 of Exhibit A is attached to this affidavit as Exhibit B.

Your affiant states that in the regular course of business in April of 1956 that Ralph McLean on April 2, 1956 and Lloyd McLean on April 13, 1956 gave notice of probable loss to the corporation to winter wheat, which was covered under the insurance contract, said loss occurring from winter kill.

Your affiant states further that an adjuster was sent to the farms of Ralph McLean and Lloyd Mc-

Lean, wherein it was the adjuster's opinion, and also your affiant's, that it was practical to reseed due to the early date and to good moisture in the ground. In relation to denying or approving payments on claims of loss, your affiant states that he is absolutely without any authority to either deny a claim or to approve a claim but that he does have authority to recommend approval or denial of claims to the manager of the Chicago Branch of the Federal Crop Insurance Corporation, who has the authority to deny or approve claims. Your affiant further states that in all cases where a notice of loss and proof of loss is furnished to your affiant as the Washington State Director of the Federal Crop Insurance Corporation that it is encumbent and necessary that the claim and proof of loss be forwarded to [37] the manager of the Chicago Branch for either approval or denial.

Your affiant was advised by the Douglas County crop insurance adjusters that some of the insureds had requested the State Director to be present at a meeting at St. Andrews, Douglas County, Washington on April 9, 1956. At that time your affiant answered questions asked by individuals who were present at said meeting. At the meeting your affiant advised all present that your affiant did not have final authority to either deny or approve a claim but that in your affiant's opinion, that if at this time the policy holders of Federal Crop Insurance Corporation contracts in Douglas County would make a claim under the policies to be paid for damage

done by winter kill to the 1956 winter wheat crop, the claims would be rejected. Your affiant does not know the identity of the individuals present at that meeting, other than Mr. Curt Clark, attorney at law, and certain of the adjusters.

Your affiant, at the request of Mr. Curt Clark, signed a handwritten sheet of paper setting out the above. The copy of the instrument signed by your affiant is attached to this affidavit as Exhibit C. At that meeting your affiant also advised those present that in your affiant's opinion it was customary and practical to reseed in Douglas County, and that under Paragraph 4 of the contract of insurance, referred to as Exhibit A, that if it was practical to reseed, the insurance contract would not attach unless the acreage was reseeded, and further that your affiant's recommendation to the Federal Crop Insurance Corporation would be that it was in this case practical to reseed. Your affiant's opinion as expressed was based upon paragraph 4 of the policy as set out as Exhibit A.

Your affiant received a letter dated May 9, 1956 from Mr. Ned W. Kimball reflecting that certain of the named plaintiffs had suffered a loss through winter kill. A copy of said letter is attached as Exhibit D. Your affiant has personally examined all files and records and no other individual other than those listed [38] in Exhibit D has furnished any type of notice of loss to the Federal Crop Insurance Corporation as is required in paragraph 14 of Exhibit A.

Your affiant further states that he has personally examined all files and records and that no individual either named in Exhibit D or listed as plaintiff in the amended complaint has furnished proof of loss to the Federal Crop Insurance Corporation as required in Section 17 of the contract of insurance, Exhibit A.

Your affiant further states that Exhibit A was printed in the Federal Register of September 21, 1951, Section 418.160, and is the same with relation to paragraph 4, 14 and paragraph 17 referred to in this affidavit. Your affiant states further that after examination of the individual records of each plaintiff that it discloses that no denial of the claims was ever made in that the proof of loss was never submitted to the corporation affording it the opportunity to either deny or approve.

/s/ CREIGHTON F. LAWSON.

Subscribed and Sworn to before me this 4th day of December, 1957.

[Seal] /s/ STANLEY D. TAYLOR,
Notary Public in and for the State of Washington, residing at Spokane. [39]

[Note: Exhibit A is the same as set out at pages 9-17 except for the note, the word "Sample" on page 1 and the following]:

Exhibit "A"—(Continued)

Points For the Insured To Remember

These points are only reminders. Read your contract carefully.

Caring For Your Crop

You are expected to follow good farming practices in seeding, caring for, and harvesting your wheat crop.

Reporting Acreage

Promptly after seeding your wheat you are required to submit an acreage report to the county office.

Reporting Damage Before Threshing

Report promptly to the county office any material damage to your wheat crop.

Reporting Loss After Threshing

If the total production of wheat on any insurance unit is less than the coverage for the insurance unit, report this fact to the county office immediately after completion of threshing or by October 31 if threshing is not completed by that date.

Paying Your Premium

Your premium note is due on the maturity date shown in the Date Table of this policy. Advance payment in accordance with the terms of your contract will entitle you to a 5-percent discount. If you do not take advantage of the discount, prompt payment at maturity will avoid interest charges.

Commingling Production

If you anticipate a loss, do not mix production

Exhibit "A"—(Continued)

from insurance units without keeping records which will accurately show the production from each.

Length of Contract

This contract remains in effect from year to year until canceled by either party.

Transfer of Growing Crop

All or any part of your interest in an insured wheat crop may be transferred to another person, but he will have no protection under the contract unless he immediately makes suitable arrangements with the Corporation for the payment of any premium. However, such arrangements will not relieve you of responsibility for the total premium.

Death of Insured

The successor-in-interest should contact the county office promptly.

If seeding has begun at the time of death, the contract of the deceased will continue in force but only for that crop year. If seeding has not begun at the time of death, the contract of the deceased terminates and will not cover the crop to be seeded. The successor-in-interest should promptly contact the county office relative to obtaining insurance protection.

U. S. Government Printing Office: 1953—
O-241345

Exhibit "A"—(Continued)

Attach This Rider To Your Crop Insurance Policy

WHEAT CROP INSURANCE RIDER

To All Wheat Crop Insurance Policies

(Effective beginning with the 1955 Crop Year)

1. Section 2 is changed to read as follows:

2. Insurable acreage. For each crop year of the contract any acreage is insurable only if a coverage for such acreage is shown on the county actuarial table for that crop year, provided, however, in any county where a coverage(s) is established by a farming practice(s) any acreage is insurable only if a coverage is established for the farming practice followed on such acreage.

2. Section 6 is changed to read as follows:

6. Coverage per acre. The coverage per acre established for the area in which the insured acreage is located shall be shown, by practice(s) where applicable, on the county actuarial table on file in the county office. The coverage per acre is progressive depending upon whether the acreage is (a) First Stage — released and seeded to a substitute crop, (b) Second Stage — not harvested and not seeded to a substitute crop or (c) Third Stage— harvested.

3. Subsections (a) and (d) of section 9 are changed to read as follows:

Exhibit "A"—(Continued)

9(a) Subject to the provisions of this section, the contract shall be in effect for the first crop year specified on the application and shall continue in effect for each succeeding crop year until canceled by either the insured or the Corporation. Cancellation may be made by either party giving written notice to the other party on or before the applicable cancellation date preceding the crop year for which the cancellation is to become effective: Provided, however, That (1) if by the March 31 following such cancellation date for all counties with a December 31 cancellation date any amount of premium remains unpaid or (2) if by such cancellation date for all other counties any amount of premium, except the premium due on the crop harvested or to be harvested in the calendar year in which the cancellation date occurs, remains unpaid, the contract shall terminate as if canceled by the Corporation prior to such cancellation date. Any notice of cancellation by the insured shall be in writing and shall be filed with the county office. The Corporation shall mail any notice of cancellation to the insured's last known address and mailing shall constitute notice to the insured.

9(d) If the Corporation determines that the county minimum participation requirement established by the Federal Crop Insurance Act, as amended, is not met for any crop year, insurance shall not be in effect for that crop year and the contract shall terminate.

Exhibit "A"—(Continued)

4. Section 12 is changed to read as follows:

12. Amount of annual premium. (a) The premium rate per acre will be established by the Corporation for the coverage and rate area in which the insured acreage is located and will be shown, by practice(s) where applicable, on the county actuarial table on file in the county office. The annual premium for each insurance unit under the contract will be based upon (1) the insured acreage of wheat, (2) the applicable premium rate(s) and (3) the insured interest(s) in the crop at the time of seeding. There will be a reduction in the annual premium for each insurance unit of 4 percent for the first full 200 acres of insured acreage on the unit and an additional 2 percent reduction for each additional full 100 acres, provided, however, that the total reduction shall not exceed 20 percent. The annual premium for the contract shall be the total of the premiums computed for the insured for all insurance units covered by the contract, and with respect to any insured acreage shall be earned and payable when the wheat on such acreage is seeded.

(b) The premium rate(s) shown on the county actuarial table is based on prompt payment and any amount of the premium which remains unpaid on the day following the discount date (the discount date shall be the November 30 following the time the wheat crop is normally harvested) will be increased by 10 percent, which increased amount shall be the premium balance. Thereafter, at the end of each 12 months' period, 6 percent simple

Exhibit "A"—(Continued)

interest shall attach to any amount of the premium balance remaining unpaid. Interest shall not be charged on premiums earned in the 1955 and succeeding crop years except as specified in this section.

(c) The insured's annual premium for any year may be reduced 25 percent if he has had seven consecutively insured wheat crops (immediately preceding the current crop year) without a loss for which an indemnity was paid. Whether or not the insured is eligible for the above premium reduction, his annual premium may be reduced in lieu of the above in any year by not to exceed 50 percent if it is determined by the Corporation that the accumulated balance of premiums over indemnities on consecutive insured wheat crops exceeds his total coverage (computed on a harvested acreage basis). Nothing in this paragraph shall create in the insured any right to a reduced premium.

(d) Notwithstanding any other provision of the contract, if in any year a premium is earned and totals less than $10.00 the amount shall be increased to $10.00.

5. Subsection (b) of section 13 is changed to read as follows:

13(b) Any unpaid amount of any premium or any other amount owed the Corporation by the insured may be deducted from any indemnity payable by the Corporation or from any loan or any payment made to the insured under any act of Congress

Exhibit "A"—(Continued)

or program administered by the United States Department of Agriculture. There shall be no refund of any annual premium overpayment of less than $1.00 unless written request for such refund is received by the Corporation within one year after the payment thereof.

6. Section 18 is changed to read as follows:

18. Insurance unit. Losses shall be determined separately for each insurance unit except as provided in section 19(b). An insurance unit consists of (a) all the insurable acreage of wheat in the county in which the insured has 100 percent interest in the crop at the time of seeding, or (b) all the insurable acreage of wheat in the county owned by one person which is operated by the insured as a share tenant, or (c) all the insurable acreage of wheat in the county which is owned by the insured and is rented to one share tenant at the time of seeding. For any crop year of the contract, acreage shall be considered to be located in the county if a coverage is shown therefor on the county actuarial table. Land rented for cash or for a fixed commodity payment shall be considered as owned by the lessee.

7. Item 4 of the "Production Schedule" contained in section 19 is changed to read as follows:

Acreage classification: 4. Acreage from which threshed wheat as determined by the Corporation (1) does not grade No. 3 or better and does not grade No. 4 or 5 on the basis of test weight only (determined in accordance with the Official Grain

Exhibit "A"—(Continued)

Standards of the United States) because of poor quality due to insurable causes, and would not meet these requirements if properly handled, and (2) has a value per bushel which is less than the lower of the fixed price or the Commodity Credit Corporation county loan rate for No. 5 wheat on the basis of test weight.

Stage of coverage to be used: Third.

Production to be counted: The number of bushels obtained by (1) multiplying the bushels of such threshed wheat by the value per bushel as determined by the Corporation, and (2) dividing the result thus obtained by the lower of the fixed price or the Commodity Credit Corporation county loan rate for No. 5 wheat on the basis of test weight.

8. Subsection (a) of section 30 is deleted.

9. Subsection (d) of section 30 is changed to read as follows:

30(d) "County office" means the Corporation's office for the county, shown on the application for insurance or such other office as may be specified by the Corporation from time to time.

10. Section 30 is changed by adding a subsection (k) to read as follows:

30(k) "County" means the area shown on the county actuarial table which may include farms located in a local producing area(s) bordering on the county.

11. Section 32 is changed by deleting the matu-

Exhibit "A"—(Continued)

rity dates and changing the discount date to November 30 for all counties.

12. Section 32 is changed by establishing a cancellation date of April 30, and a discount date of November 30 for Bennett County, South Dakota.

Approved: beginning with the 1955 Crop Year.

[Seal] Federal Crop Insurance Corporation. (Code 548)

U. S. Government Printing Office: 1954 O-287861

Form FCI-63-Rev. February, 1955

UNITED STATES DEPARTMENT OF AGRICULTURE
FEDERAL CROP INSURANCE CORPORATION

Form Approved Budget Bureau No. 40-R1088.1

INSPECTION REPORT AND CLAIM

Constitutes Claim (Statement in Proof of Loss) Only If Marked "Final"

_____, 19____ (Insured Crop) (Crop Year)

Preliminary [] Final []

_____ (Contract Number)

_____ (Name of Insured)

_____ (Insurance Unit Number)

_____ (Address of Insured)

_____ (Other Contracts on This Acreage)

_____ (Date Threshing or Harvesting Completed)

_____ (Date of Notice of Damage or Loss)

_____ (Date of Inspection)

_____ (Collateral Assignment?–Yes or No)

REPORTED ACREAGE	DETERMINED ACREAGE	INSURED INTEREST	LEVEL OF INSURANCE	CLASS OF BEANS
A	B	C	D	E

PART I. FIELD OR TRACT INFORMATION

Field or Tract Identification	Area No. and Practice	Acreage in Field or Tract	Acreage Released	Stage of Production	Appraised Production per Acre	Actual or Intended Use
(A)	(B)	(C)	(D)	(E)	(F)	(G)

PART II. PRODUCTION ACTUALLY HARVESTED (Must include the shares of all persons who have an interest in the crop)

1. Stored in Bins or Cribs on Farm

Length or Diameter (Feet)	Width (Feet)	Depth (Feet)	Gross Cubic Feet	Deductions for Studding	Net Cubic Feet (K minus L)	Gross Bu. or Cwt. (By Volume)	Test Weight or Excess Moisture	Gross Bu. or Cwt. (By Weight)	Percent Dockage or Lbs. Defects	Grade or Percent of Pick (Beans)	Net Bu. or Cwt. (By Weight)
(H)	(I)	(J)	(K)	(L)	(M)	(N)	(O)	(P)	(Q)	(R)	(S)

2. Stored in Sacks on Farm

_____ (Number of Sacks) _____ (Net Weight per Sack)

3. Sold or in Commercial Storage

_____ (Elevator) _____ (Address)

_____ (Elevator) _____ (Address)

4. Other Production Actually Harvested (Seed, Feed, etc.)

5. Total Production Actually Harvested

PART III. PRODUCTION SHOWN ABOVE WHICH IS ELIGIBLE FOR QUALITY ADJUSTMENT

No. Bu. or Cwt. Value Per Bu. or Cwt. $

PART IV. CAUSE(S) OF DAMAGE INSURED AGAINST			PART V. REDUCED YIELD DUE TO UNINSURED CAUSE(S)			
Causes	Percent	Approximate Date	Causes	Fields	Acres	Appraised Reduction Per Acre
Primary:						
Secondary:						

PART VI. ADJUSTER'S NARRATIVE

EXHIBIT "B"

PART VII. CERTIFICATION, CLAIM, RELEASE, AND ASSIGNMENT

(a) I hereby certify that, to the best of my knowledge and belief, the foregoing data are complete, true, and correct.
(b) I hereby make claim, if this "Inspection Report and Claim" is marked "Final", for the amount of indemnity due me computed in accordance with the terms of the insurance contract on the basis of the aforesaid data.
(c) Upon delivery of a check made payable to me or to my assignee in the amount determined under (b) above, I hereby discharge the Federal Crop Insurance Corporation from any further liability for the above-mentioned crop on the insurance unit indicated above.
(d) I hereby assign and transfer to the Corporation with full power of attorney, to the extent of any indemnity paid to me all my rights of recovery against any person(s) for loss or damage caused by such person(s) and agree to execute all necessary papers and otherwise to do everything proper to assist the Corporation to effectuate such rights.

_____, 19____ (Date) _____ (Signature of Insured)

I certify that, to the best of my knowledge and belief, the facts as reported herein are complete, true, and correct, and were determined in accordance with the applicable regulations and procedures of the Corporation.

_____, 19____ (Date) _____ (Signature of Adjuster)

I recommend acceptance of the data on this "Inspection Report and Claim" for the computation of any insured loss due on this unit.

_____, 19____ (Date) _____ (Signature of State Director)

☆ U. S. Government Printing Office: 1955 - 347471

BRANCH OFFICE COPY

EXHIBIT "C"

(Copy)

The undersigned, State Director of Federal Crop Insurance Corporation, authorized to speak for said Corporation, does hereby state that if the policy holders of Federal Crop Insurance in Douglas County make a claim under the polices to be paid for the 1956 crops at this time said claims will be rejected in his opinion.

Dated this 9th day of April, 1956.

CREIGHTON F. LAWSON. [45]

EXHIBIT "D"

(Copy)

NED W. KIMBALL
Attorney-at-Law
Waterville, Washington

May 9, 1956

Federal Crop Insurance Corporation
Douglas County Office
Waterville, Washington
Gentlemen:

Please take notice that the following farmers have sustained a loss through winter-kill. Each of the farmers named herein are holders of a Federal Crop Insurance Corporation insurance policy.

Name	Approx. Acres
Harold Roberts Coulee City, Washington	351
Ralph McLean Mold, Washington	753

Exhibit "D"—(Continued)

Name	Approx. Acres
Robert Jessup Mansfield, Washington	160
Geo. A. Murison Mansfield, Washington	548
Andrew G. Nilles Mansfield, Washington	900
H. E. McDonald Coulee City, Washington	204
W. H. McDonald Coulee City, Washington	353
M. E. Scheibner Coulee City, Washington	213
Theodore B. Rice Coulee City, Washington [46]	573
Loren W. Pendell Grand Coulee, Washington	140
J. E. Thoren Elmer City, Washington	800
E. O. McLean Mansfield, Washington	428
E. G. Branscom Mansfield, Washington	572
S. A. Buckingham Mansfield, Washington	378
R. E. Buckingham Mansfield, Washington	312
Davis Bros. Coulee City, Washington	990
David G. Davis Coulee City, Washington	430

Exhibit "D"—(Continued)

Name	Approx. Acres
T. R. Davis Coulee City, Washington	160
Frank Miller Coulee City, Washington	205
Lloyd McLean Mold, Washington	490
Claude Miller St. Andrews, Washington	365
Miller Bros. St. Andrews, Washington	700
E. E. Smith Coulee City, Washington	880
Clyde W. Miller St. Andrews, Washington	280
Russell H. Hunt Brewster, Washington [47]	700
Edwin Miller Mansfield, Washington	214
Clarence Davis Coulee City, Washington	410
Teressa M. Davis Coulee City, Washington	1588
Eugene Frederick Coulee City, Washington	687
J. W. Buob & Sons Coulee City, Washington	927
John A. Danielson Waterville, Washington	800

Exhibit "D"—(Continued)

Name	Approx. Acres
W. J. Hawes Withrow, Washington	226
Geo. Jordan & Sons Withrow, Washington	500
Dale Leander Mold, Washington	650
Lucile E. Besel Waterville, Washington	89

Since Mr. Lawson's statement made at St. Andrews on April 9th, we realize that it would be useless to present formal claims.

Yours very truly,

KIMBALL & CLARK,

By

NWK:lr [48]

Certificate of Service by Mail Attached. [49]

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF C. M. CLARK

State of Washington,
County of Douglas—ss.

C. M. Clark, being first duly sworn on oath, deposes and says:

That he is the Curt Clark referred to in the affidavit of Creighton Lawson as the attorney who attended the meeting at St. Andrews April 9, 1956.

That the wheat loss claims of plaintiffs all resulted from winter kill of the 1956 wheat crop and were all first ascertained by plaintiffs on or about April 1, 1956, when the snow melted off the lands of plaintiffs. Insofar as liability of defendant is concerned the claims are all identical. That along with Mr. Lawson and the plaintiffs, your affiant attended the meeting of April 9th and that at said meeting Mr. Lawson, after an inquiry by your affiant, stated that he was authorized to speak for the Federal Crop Insurance Corporation. That, the wheat loss of plaintiffs was discussed by the plaintiffs and representatives of the Federal Crop Insurance Corporation present and that all the Federal Crop Insurance Corporation personnel agreed that plaintiffs' loss was not covered by the policy. When Mr. Lawson was asked about treatment of claims he stated that if claims were filed at that time such claims would be denied; thereupon, your affiant advised the plaintiffs that they should re-seed their lost acreage in order to mitigate their damage in view of the repudiation of the contract by Mr. Lawson. Following the advice of your affiant the plaintiffs did re-seed the lost acreage.

Exhibit E attached hereto is a rejection of the claim presented by Ralph McLean which said rejection was handed to your affiant by Ralph McLean. Exhibit F attached hereto is a rejection of the claim presented by Lloyd McLean which said rejection was [50] handed to your affiant by Lloyd McLean. Exhibit G is a carbon copy of a letter written by your affiant to Mr. Lawson. Exhibit H is his reply

thereto. Exhibit I is a letter from Mr. C. A. Fretts, manager of the Federal Crop Insurance Corporation, in which he concurred with the rejection of the claims made by Mr. Lawson.

/s/ C. M. CLARK.

Subscribed and Sworn to before me this 16th day of December, 1957.

[Seal] /s/ LOLA RINKER,
Notary Public in and for the State of Washington, residing at Waterville. [51]

* * * * *

EXHIBIT "F"

United States Department of Agriculture
Federal Crop Insurance Corporation
206 Hutton Building
Spokane 4, Washington

April 16, 1956

Mr. Lloyd McLean
St. Andrews
Washington

Re: Policy 91-009-6-213

Dear Mr. McLean:

This is to acknowledge your notice of loss to your fall seeded wheat crop due to winterkill.

Since farmers are reseeding to wheat and it is practical to reseed to wheat in Douglas County, it is a condition of the contract, Section 4, that any destroyed wheat acreage be reseeded, where it is practical to reseed, in order for the insurance to attach to the acreage.

We cannot at this time set a date as to when it

Exhibit "F"—(Continued)

will be too late to reseed. We will have to be guided by what farmers in the county are doing. As long as reseeding is being done in the county, we will expect that any destroyed wheat acreage will be reseeded in order for the insurance protection to attach to the wheat acreage.

Since thinking over the discussion which took place at the meeting in St. Andrews recently, it occurred to me that it may be the general opinion that the reseeding provision applies only to winter kill. This is not the case. The reseeding provision would apply to any cause of loss where the provision is applicable.

After it has become too late to reseed to wheat, you should keep the following contract requirements in mind:

1. If there is further damage during the growing season to the extent that you think an indemnity will be due under your contract, or to the extent that you want to make other use of a part of the acreage, you should immediately report such damage in writing to your county crop insurance office. [54]

2. You should not destroy any evidence of planting nor should other use be made of the insured acreage before it is inspected by a Corporation adjuster.

3. If the total production of any insurance unit covered by the contract is less than the coverage, report this fact in writing to your county crop in-

Exhibit "F"—(Continued)

surance office immediately after harvest or by October 31 if harvesting is not completed by that date.

Very truly yours,

/s/ CREIGHTON F. LAWSON,
Creighton F. Lawson,
Washington State Director. [55]

EXHIBIT "G"

May 10, 1956

Mr. Creighton F. Lawson
Washington State Director of F.C.I.C.
206 Hutton Bldg.
Spokane, Washington

Dear Sir:

We represent several farmers in Douglas County who desired to make claims under their crop policies for damage done to the 1956 crop through winter kill. The claims were to be made under the second stage of coverage, and in reliance on paragraph 16 of the insurance policy.

Because of the statements made at the St. Andrews meeting about the claims, if made, the farmers could readily see that it would be useless to submit them.

Our clients therefore have now reseeded the acres killed by the winter and desire that your corporation pay them the cost of reseeding. This cost is estimated to be approximately $6.00 per acre.

We feel that the paragraph of the policy which

Exhibit "G"—(Continued)

your agents were relying on when they made the statements at St. Andrews does not control the situation in view of the language of paragraph No. 8. Your agents were basing their opinion on the language of paragraph 4.

We are prepared to go into litigation over this matter but felt you might like some time to go into the dispute with your counsel.

Unless we hear that you would like to discuss these matters with us by May 22nd, we shall commence our action.

Respectfully yours,

KIMBALL & CLARK,
/s/ By C. M. CLARK,
C. M. Clark. [56]

* * * * *

EXHIBIT "I"

United States Department of Agriculture
Federal Crop Insurance Corporation
Washington, D. C.

May 21, 1956

Kimball & Clark
Attorneys at Law
Coulee City, Washington
Attention: Mr. C. M. Clark

Gentlemen:

Our Washington State Director has forwarded for our consideration your letter of May 10, 1956, in

Exhibit 'I''—(Continued)

regard to claims which several Douglas County wheat farmers expect to litigate, and a copy of his reply dated May 14, 1956.

We believe Mr. Lawson rather adequately set forth the position of the Corporation under the reseeding requirements of the wheat crop insurance policies in his reply to your letter. There are, however, some points which were not covered and perhaps one of vital importance in this matter which we might call to your attention. This Corporation derives its existence and powers from the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.). To carry out the purposes of this act, the Corporation is authorized and empowered to insure against unavoidable loss of designated commodities, including wheat, but there are certain specified limitations of authority including a provision in Section 1508(a) which reads in pertinent part as follows:

> "Insurance provided under this subsection shall not cover losses due to the neglect or malfeasance of the producer, or to the failure of the producer to reseed to the same crop in areas and under circumstances where it is customary to so reseed, or failure of the producer to follow established good farming practices."

The reseeding requirement in paragraph 4(a) of the policy is founded upon the statutory limitation cited and we respectfully submit that the policy necessarily contains such a limitation. [58] It is noted by reference to your letter to Mr. Lawson

Exhibit 'I''—(Continued)

that you are of the opinion that paragraph 4 of the policy is not controlling in view of the language of paragraph 8 of the policy. We believe it is sufficient at this time to say that this provision must be read in the light of the statute and the corresponding limitation of paragraph 4.

We note that your clients have now reseeded their acreages killed by the winter and propose to take action to recover the cost of reseeding, estimated to be approximately $6.00 per acre. Our reaction to this is, and necessarily must be if we are to comply with the law, that this Corporation is without authority to reimburse insureds in such circumstances.

As of this time insurance is still in force and should there be an insured loss under the terms of the contract on the acreage as reseeded, the insured involved will, of course, be indemnified upon proof thereof, as required. Otherwise, there is no basis for any claim. It is regrettable that after many years of operation under the Federal Crop Insurance Act and regulations prescribed pursuant thereto, there should be encountered such county-wide misunderstanding on the reseeding requirement. We sincerely trust that it has not created such unrest among our insureds there as to cause them to become dissatisfied with a program that is so vitally important to them in times of unavoidable losses.

This, we believe, sufficiently sets forth the position which this Corporation is compelled to assume

Exhibit "I"—(Continued)

and will defend when called upon to do so.

Very truly yours,

/s/ C. A. FRETTS,
C. A. Fretts,
Acting Manager. [59]

[Endorsed]: Filed December 18, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD McLEAN

State of Washington,
County of Grant—ss.

Lloyd McLean, being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs in the matter entitled Harold Roberts, et al., vs. Federal Crop Insurance Corporation; that he presented a claim for loss of the 1956 crop by winter kill; that the said claim was rejected by Creighton Lawson by letter; and that no further rejection was received by your affiant from the Chicago or any other office of the defendant; that he was present at the meeting of April 9, 1956 at St. Andrews and that he at no time heard Mr. Lawson disclaim any authority to deny claims for the corporation.

/s/ LLOYD McLEAN.

Subscribed and sworn to before me this 17th day of December, 1957.

[Seal] /s/ CURTISS M. CLARK,
Notary Public in and for the State of Washington, residing at Coulee City. [60]

[Endorsed]: Filed December 18, 1957.

[Title of District Court and Cause.]

OPINION

Driver, District Judge.

Defendant has moved for summary judgment. The motion is supported by affidavits, and plaintiffs have filed answering affidavits. The motion must be denied unless it clearly appears that without any factual controversy defendant is entitled to judgment as a matter of law.[1] For the purpose of passing upon the motion, wherever there is any difference or dispute as to the facts, I shall take the plaintiffs' version as the true and correct one.

Plaintiffs' claims are set forth in their amended complaint. Its pertinent allegations may be summarized as follows:

All of the plaintiffs are farmers who seeded wheat crops in Douglas County, Washington in the late summer of 1955. Such crops were insured against certain designated hazards, including winter-kill, by insurance policies issued by defendant. The policies each contained the following provisions:

"8. Insurance period. Insurance with respect to any insured acreage shall attach at the time the wheat is seeded * * *"

"16. Time of loss. Any loss shall be deemed to have occurred at the end of the insurance period,

[1] Rule 56 F.R.C.P.; and Cox v. American Fidelity & Casualty Co., et al., ——F. 2d—— (9 Cir.—No. 15,309, decided 11/14/57).

unless the entire wheat crop on the insurance unit was destroyed earlier, in which event the loss shall be deemed to have occurred on the date of such damage as determined by the Corporation."

"6. Coverage per acre. The coverage per acre established for the area in which the insured acreage is located shall be shown by practice(s) on the county actuarial table on file in the county office. The coverage per acre is progressive depending upon whether the acreage is (a) First Stage—released and seeded to a substitute crop, (b) Second Stage—not harvested and not seeded to a substitute crop, or (c) Third Stage—harvested."

In the Spring of 1956, when the snow melted off the land, it became apparent that plaintiffs' wheat crops were "a total loss." Thereafter, on April 9, 1956, at a meeting at St. Andrews, Washington, the plaintiffs "received information from one Creighton Lawson, Washington State Director of the defendant Corporation, * * *" that no claims would be paid for the loss if the plaintiffs made such claims under the policies. [62]

As a result "of the repudiation of the contract by the defendant, plaintiffs, in order to mitigate their damage, were forced to reseed the acreage on which the winter wheat crop had been lost at a cost of $6.50 per acre" on approximately 40,000 acres.

The amended complaint also contains the following paragraph:

"That, depending on the yield of the 1956 crop as reseeded, the above mentioned repudiation of the

contract by defendant may result in further damage to the plaintiffs in an amount equal to the difference between the actual amount harvested and the insured amount of wheat and that in order to perfectly protect the plaintiffs the Court should direct that the insurance be reinstated."

The plaintiffs pray for judgment for the expense of reseeding at $6.50 per acre, for reinstatement of the insurance, and for other relief.

The paragraph XI quoted above, is identical to paragraph X of the original complaint verified on June 15, 1956, before the wheat crops could have been harvested. The amended complaint was filed September 23, 1957, more than a year after the 1956 harvest time. As will appear later herein, the defendant Corporation has consistently maintained that the insurance carried over and attached to the reseeded crops of the plaintiffs. It would seem, therefore, that there was no loss or damage to the reseeded wheat covered by the insurance policies, or plaintiffs would have specifically claimed the same when they filed their amended complaint in September, 1957.

The defendant is "an agency of and within the Department of Agriculture * * *" of the United States.[2] The form of crop insurance policy is prescribed in a federal regulation which has the force and effect of a statute. It was published in the Federal Register of September 21, 1951 (Vol. 16, Number 184, p. 9628, et seq.). In support of its motion,

[2] Sec. 1503, Title 7 U.S.C.A.

defendant calls attention to the following provisions:

"4. Insured acreage. The insured acreage with respect to each insurance unit shall be the acreage of wheat seeded for harvest as grain as reported by the insured [63] or as determined by the Corporation, whichever the Corporation shall elect, except that insurance shall not attach with respect to (a) any acreage seeded to wheat which is destroyed (as defined in section 15) and on which it is practical to reseed to wheat, as determined by the Corporation, and such acreage is not reseeded to wheat * * *"

"14. Notice of loss or damage. (a) If any damage occurs to the insured crop during the growing season and a loss under the contract is probable, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office promptly after such damage.

"(b) If a loss under the contract is sustained, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office within 15 days after threshing is completed or by October 31, whichever is earlier."

"17. Proof of loss. If a loss is claimed, the insured shall submit to the Corporation, on a Corporation form entitled 'Statement in Proof of Loss', such information regarding the manner and extent of the loss as may be required by the Corporation. The statement in proof of loss shall be submitted not later than sixty days after the time of loss, unless the time for submitting the claim is extended

in writing by the Corporation. It shall be a condition precedent to any liability under the contract that the insured establish the production of wheat on the insurance unit, the amount of any loss for which claim is made, and that such loss has been directly caused by one or more of the hazards insured against by the contract during the insurance period for the crop year for which the loss is claimed, and that the insured further establish that the loss has not arisen from or been caused by either directly or indirectly, any of the causes of loss not insured against by the contract * * *" [64]

"28. Modification of contract. No notice to any representative of the Corporation or the knowledge possessed by any such representative or by any other person shall be held to effect a waiver of or change in any part of the contract, or to estop the Corporation from asserting any right or power under such contract, nor shall the terms of such contract be waived or changed except as authorized in writing by a duly authorized officer or representative of the Corporation; * * * "

The affidavit of Mr. Creighton F. Lawson, to which is attached a sample form of the Wheat Crop Insurance Policy, recites that affiant has personally examined all the files and records of the defendant Corporation and that none of the plaintiffs has furnished a proof of loss to defendant as required by the policies. The same affidavit further states that plaintiff Ralph McLean on April 2, 1956, and plaintiff Lloyd McLean on April 13, 1956, gave notice to defendant of probable loss of winter wheat.

There is no allegation or factual showing of any kind on the part of the plaintiffs that any of them ever furnished either a notice of damage or loss, or proof of loss, with the exception of the two McLeans.

An affidavit filed herein by plaintiff Lloyd McLean states that "he presented a claim for loss of the 1956 crop by winter kill; that the said claim was rejected by Creighton Lawson by letter; * * * " (Emphasis supplied.)

There is also in the file an affidavit of Mr. C. M. Clark, an attorney at law, who attended the April 9, 1956 St. Andrews meeting on behalf of the wheat growers. The affidavit recites that Mr. Lawson said at the meeting that he was authorized "to speak for" the defendant Corporation; that he was in agreement with other representatives of the corporation then present that the loss was not covered by the policies; and that "if claims were filed at that time" they would be denied. Mr. [65] Clark then advised the farmers to "reseed their lost acreage in order to mitigate their damage in view of the repudiation of the contract by Mr. Lawson." The farmers followed his advice and did reseed the lost acreage.

Attached to Mr. Clark's affidavit as exhibits E and F are documents designated in the affidavit respectively as "rejection of the claim presented by Ralph McLean", and "rejection of the claim presented by Lloyd McLean." Exhibit E is a copy of

a letter on the Spokane office letterhead of defendant. It is dated April 12, 1956, is directed to Ralph McLean, and is signed by Creighton F. Lawson, Washington State Director. The first two paragraphs are as follows:

"Our loss adjuster for Douglas County has made a preliminary inspection of your fall seeded wheat crop in response to your notice of material damage filed April 2, 1956. A copy of this preliminary inspection is enclosed.

"Since farmers are reseeding to wheat and it is practical to reseed to wheat in Douglas County, it is a condition of the contract, Section 4, that any destroyed wheat acreage be reseeded, where it is practical to reseed, in order for the insurance to attach to the acreage."

Exhibit F is a copy of a letter headed and signed the same as Exhibit E, but dated April 16, 1956, and directed to Lloyd McLean. The first paragraph reads as follows:

"This is to acknowledge your notice of loss to your fall seeded wheat crop due to winter kill." (Emphasis supplied.)

The second paragraph is the same as the second paragraph of Exhibit E quoted above.

There is also attached to Mr. Clark's affidavit, copies of letters marked as exhibits G, H, and I. Exhibit G is a copy of a letter from Mr. Clark to Mr. Lawson as State Director of F.C.I.C., dated May 10, 1956. The first three paragraphs read:

"We represent several farmers in Douglas County

who desired to make claims under their crop policies for damage done to the 1956 crop through winter kill. The claims were to be made under the second stage of coverage, and in reliance on paragraph 16 of the insurance policy.

"Because of the statements made at the St. Andrews meeting about the claims, if made, the farmers could readily see that it would be useless to submit them. [66]

"Our clients therefore have now reseeded the acres killed by the winter and desire that your corporation pay them the cost of reseeding. This cost is estimated to be approximately $6.00 per acre."

Exhibit H, a copy of Mr. Lawson's answering letter to Kimball & Clark, dated May 14, 1956, is as follows:

"This is in reply to your letter dated May 10, 1956 concerning winter damage to fall seeded wheat in Douglas County.

"As you know, the wheat crop insurance policy of the Federal Crop Insurance Corporation provides that insurance does not attach to any acreage which has been destroyed and on which it is practical to reseed to wheat. Since reports from the county extension agent and other agencies indicate that 98 percent of the wheat was reseeded in Douglas County, it would appear that there is no question concerning whether or not it was practical to reseed. Since you have indicated that your clients have reseeded, the insurance remains in force and should any loss occur under the terms of the con-

tract between the time of reseeding and harvest, the crop will be protected.

"There is no provision in the insurance contract to reimburse insureds for the cost of reseeding, other than that the reseeding practice was considered when coverages were established for the county. In counties where reseeding is considered practical, coverages are generally much higher than in counties where it is not practical to reseed.

"Your letter is being forwarded to the manager of the Federal Crop Insurance Corporation in Washington, D. C. for any further comments which he may wish to make."

Exhibit I is a copy of a letter to Kimball & Clark from the Washington office of the defendant, dated May 21, 1956. Its pertinent part is as follows:

"Our Washington State Director has forwarded for our consideration your letter of May 10, 1956, in regard to claims which several Douglas County wheat farmers expect to litigate, and a copy of his reply dated May 14, 1956.

"We believe Mr. Lawson rather adequately set forth the position of the Corporation under the reseeding requirements of the wheat crop insurance policies in his reply to your letter. There are, however, some points which were not covered and perhaps one of vital importance in this matter which we might call to your attention. This Corporation derives its existence and powers from the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.). To carry out the purposes of this act, the Corporation is authorized and empowered to insure against un-

avoidable loss of designated commodities, including wheat, but there are certain specified limitations of authority including a provision in Section 1508 (a) which reads in pertinent part as follows:

"'Insurance provided under this subsection shall not cover losses due to the neglect or malfeasance of the producer, or to the failure of the producer to reseed to the same crop in areas and under circumstances where it is customary to so reseed, or failure of the producer to follow established good farming practices.' [67]

"The reseeding requirement in paragraph 4(a) of the policy is founded upon the statutory limitation cited and we respectfully submit that the policy necessarily contains such a limitation. It is noted by reference to your letter to Mr. Lawson that you are of the opinion that paragraph 4 of the policy is not controlling in view of the language of paragraph 8 of the policy. We believe it is sufficient at this time to say that this provision must be read in the light of the statute and the corresponding limitation of paragraph 4.

"We note that your clients have now reseeded their acreages killed by the winter and propose to take action to recover the cost of reseeding, estimated to be approximately $6.00 per acre. Our reaction to this is, and necessarily must be if we are to comply with the law, that this Corporation is without authority to reimburse insureds in such circumstances.

"As of this time insurance is still in force and should there be an insured loss under the terms of

the contract on the acreage as reseeded, the insured involved will, of course, be indemnified upon proof thereof, as required. Otherwise, there is no basis for any claim."

The form of crop insurance policy here involved, as indicated by the excerpts quoted above, required the insured to give written notice to the corporation of loss or damage and to submit proof of loss. The two are separate and distinct, and serve different purposes. The notice of loss informs the company that the contingency insured against has occurred, while proof of loss supplies evidence of the particulars of the occurrence, and information necessary to enable the insurer to determine its liability, and the amount thereof.[3]

The giving of notice of loss does not dispense with the requirement that proof of loss be submitted.[4] Even as to private insurance corporations, in the absence of waiver or estoppel, there must be at least substantial compliance with a requirement that written proof of loss be furnished to the insured.[5]

In the instant case it appears that plaintiffs Ralph McLean and Lloyd McLean gave notice of

[3]See Ballentine's Law Dictionary (1930); 45 C.J. S. §981, §982(1)a.

[4]Couch on Insurance, Vol. 7, Sec. 1528; Georgia Home Insurance Co. v. Jones, 135 S.W.2d 947, 951.

[5]Wedgwood v. Eastern Commercial Travelers Acc. Ass'n, 32 N.E. 2d 687; Standard Acc. Ins. Co. v. Cherry, 48 S.W. 2d 755; Milton Ice Co. Inc. v. Travelers Indemnity Co., 71 N.E.2d 232: Brindley v. Firemen's Insurance Co. of Newark, N. J., 113 A.2d 53, 35 N. J. Super. 1.

loss or damage but none of the plaintiffs ever submitted to the defendant any proof of loss. [68]

Plaintiffs rely upon the general principle of insurance law that, if the insurer, during the period in which proofs of loss are to be made, denies liability, the insurer is deemed to be estopped from invoking, or to have waived, the right to demand proofs of loss. But is the principle applicable here, where the insurer is an agency of the United States?

In his affidavit, Mr. Lawson states that "he is absolutely without any authority to either deny a claim or to approve a claim * * *" There is no affirmative showing of the extent of his authority. The statute authorizes the Secretary of Agriculture and the Corporation to issue such regulations as may be necessary (7 U.S.C.A., § 1516 (b)). The form of the policy, the extent and the limitations of the insurance coverage, the requirement as to proof of loss, and the reservations against waiver and estoppel are governed by regulations published in the Federal Register. No state director or other official, surely, would have the authority to cancel or repudiate the insurance contract of the corporation, or to make any arrangement or commitment binding upon the corporation which was contrary to, or not permitted by the governing statutes and regulations. There has not been called to my attention any regulation, statute, or provision of the insurance contract authorizing payment of the cost of reseeding an insured farmer's

wheat crop. How, then, could Mr. Lawson by his conduct and representations create such liability on the part of defendant government agency? The answer is to be found, I think, in the following excerpt from the opinion in Utah Power & Light Co. v. United States, 243 U.S. 389, 409, (37 S.Ct. 387, 61 L.Ed. 791), quoted with approval in United States v. San Francisco, 310 U.S. 16, 32 (84 L.Ed. 1050, 60 S.Ct. 749):

"* * * the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

In Felder v. Federal Crop Insurance Corporation, 146 F.2d 638, 640, the Fourth Circuit Court of Appeals applied the principle just stated in a case involving cotton crop insurance, by the same corporation named as defendant here. There the [69] insured grower had not filed a proof of loss within the time required by the policy. The court held that right of recovery was barred and that the requirement had not been waived by action on the part of the County Committee. See also, Mock v. United States, 10 Cir., 183 F.2d 174, where it was held that recovery on a wheat crop policy of the same corporation was barred for failure on the part of the insured to submit proof of loss as required by the policy.

In Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380, 68 S.Ct. 1, 92 L.Ed. 10, wheat growers

in Bonneville County, Idaho, applied to the County Committee, acting as agent for the Corporation for insurance on a crop of growing wheat. Although the Committee was correctly informed that 400 acres consisted of reseeded winter wheat acreage, it erroneously advised the growers that the entire crop was insurable, and upon its recommendation, the Corporation accepted the application. The crop was destroyed by drought, but the Corporation refused to pay the loss on the ground that the Wheat Crop Insurance Regulations did not authorize insurance of reseeded wheat and, hence, barred recovery as a matter of law. The Supreme Court sustained the contention and reversed the Court of Appeals which had affirmed the District Court. The following language of the opinion, I feel, is applicable in the instant case as well:

"The case no doubt presents phases of hardship. We take for granted that, on the basis of what they were told by the Corporation's local agent, the respondents reasonably believed that their entire crop was covered by petitioner's insurance. And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or party private, depending

upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. See Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority." (pp. 383, 384)

Defendant's motion is granted and summary judgment will be entered dismissing the action as to each and all of the plaintiffs.

/s/ SAM M. DRIVER,
United States District Judge.

Signed January 30, 1958.

[Endorsed]: Filed January 30, 1958.

United States District Court, Eastern District of Washington, Northern Division

No. 1435

HAROLD ROBERTS, RALPH McLEAN, ROBERT JESSUP, GEO. A. MURISON, ANDREW G. NILLES, H. E. McDONALD, W. H. McDONALD, M. E. SCHEIBNER, THEODORE B. RICE, LOREN W. PENDELL, J. E. THOREN, E. O. McLEAN, E. G. BRANSCOM, S. A. BUCKINGHAM, R. E. BUCKINGHAM, DAVIS BROS., DAVID G. DAVIS, T. R. DAVIS, FRANK MILLER, LLOYD McLEAN, CLAUDE MILLER, MILLER BROS., E. E. SMITH, CLYDE W. MILLER, RUSSELL H. HUNT, EDWIN MILLER, CLARENCE DAVIS, TERESSA M. DAVIS, EUGENE FREDERICK, J. W. BUOB & SONS, JOHN A. DANIELSON, W. J. HAWES, GEO. JORDAN & SONS, DALE LEANDER, LUCILE E. BESEL, CARL H. VIEBROCK, ORVAL SUPPLEE, CLARENCE R. EDGEMON, E. V. VAUGHN, CHARLES D. OLIN and JAMES EDGEMON, CLARENCE ADAMS and DAVID ADAMS, W. H. ASMUSSEN, JOHN CARLOCK, EUGENE CAVADINI, JOHNIE CAVADINI, RICHARD DALING, T. R. HEDGES, SAM IVERSEN, F. P. JENKIN, GENE JENKIN, CARL H. KUMMER, MALONE & SON, H. J. MATTHIESEN, MATTHIESEN BROS., HAROLD PETERSON, HOWARD ROBERTS, EUGENE ROBERTS, HOLLIS ROMMEL, GENE WEIMERSKIRCH, E. A. WESSELMAN, PETE WILLIAMS, EMERSON E. WOODS, RICE BROTHERS, BRANSCOM & SON, and EINER PETERSEN, Plaintiffs,

vs.

THE FEDERAL CROP INSURANCE CORPORATION, an agency of the United States. Defendant.

ORDER OF SUMMARY JUDGMENT

This matter having come on for argument before the above-entitled Court on the 18th day of December, 1957, on the defendant's motion for dismissal or in the alternative for summary judgment, the defendant being represented by William

B. Bantz, United States Attorney for the Eastern District of Washington, and Robert L. Fraser, Assistant United States Attorney for said District, and the plaintiffs being represented by Curtiss M. Clark and Ned W. Kimball, attorneys of record, and the Court having heard arguments of counsel, examined briefs submitted, and being fully advised in the premises, and having filed an Opinion on January 30, 1958 stating that the defendant's motion is granted and summary judgment will be entered dismissing the action as to each and all of the plaintiffs, [72]

It Is Hereby Ordered, Adjudged and Decreed that summary judgment is granted to the defendant, The Federal Crop Insurance Corporation, an agency of the United States of America, as to each and all of the plaintiffs, and that the action is herein dismissed as to each and all of the plaintiffs.

Done this 11th day of February, 1958.

/s/ SAM M. DRIVER,
Judge, U. S. District Court.

Presented by:

/s/ ROBERT L. FRASER,
Assistant United States Attorney, Attorney for Defendant.

[Endorsed]: Filed February 11, 1958.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Come now the plaintiffs and moves the Court for reconsideration of its summary judgment herein, for vacation of said judgment and for leave to amend their complaint as follows:

I.

That the United States District Court has jurisdiction of this matter under and by virtue of Title 7, U.S.C.A., Paragraph 1508, sub-section (c), the same being the statutory statement of jurisdiction.

II.

That all of the above named plaintiffs are farmers farming lands in Douglas County, Washington, and all are holders of policies of crop insurance issued by defendant.

III.

That the defendant is a government corporation established under the Department of Agriculture and does business in Douglas County, Washington, through agents duly appointed by said Corporation.

IV.

That each of the above named plaintiffs seeded winter wheat in the late summer of 1955, which said winter wheat was found to be a total loss in the spring of 1956 when the snow melted off the land on or subsequent to March 25, 1956. [74]

V.

That the insurance policy, in the insuring clause, reads as follows:

"In consideration of the representations and provisions in the application upon which this policy is issued, which application is made a part of the contract, and subject to the terms and conditions set forth or referred to herein, the Federal Crop Insurance Corporation (hereinafter designated as the Corporation) does hereby insure * * * (Hereinafter designated as the insured) against unavoidable loss on his wheat crop due to drought, flood, hail, wind, frost, winter-kill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes as may be determined by the Board of Directors of the Corporation."

VI.

That paragraph entitled "8. Insurance period" of said insurance policy reads as follows:

"Insurance with respect to any insured acreage shall attach at the time the wheat is seeded * * *."

VII.

That paragraph entitled "16. Time of loss" of said insurance policy reads as follows:

"Any loss shall be deemed to have occurred at the end of the insurance period, unless the entire wheat crop on the insurance unit was destroyed earlier, in which event the loss shall be deemed to have occurred on the date of such damage as determined by the Corporation."

VIII.

That paragraph entitled "6. Coverage per acre." reads as follows:

"The coverage per acre established for the area in which the insured acreage is located shall be shown by practice(s) on the county actuarial table on file in the county office. The coverage per acre is progressive depending upon whether the acreage is (a) First Stage—released and seeded to a substitute crop, (b) Second Stage—not harvested and not seeded to a substitute crop, or (c) Third Stage—harvested."

IX.

That defendant's adjusters in the area had examined the [75] losses beginning on or about April 4, 1956, and had denied coverage of the loss. That on April 9, 1956, the plaintiffs met at St. Andrews, Washington, for the purpose of deciding what course of action to follow. At the said meeting, Creighton F. Lawson, State Crop Insurance Director, who claimed to be authorized to speak for the defendant and who was in fact so authorized, after being informed completely about the situation, stated that if plaintiffs filed claims for the total loss that said claims would be denied by the corporation in accordance with its rules and regulations and its interpretation of the policy.

X.

That within the time for filing proofs of loss, coverage of plaintiffs claims had been denied by the defendant corporation, and its manager com-

municated this denial to plaintiffs through their attorney by letter dated May 21, 1956.

XI.

That, relying on the accuracy of Lawson's statement with relation to the defendant's denial of plaintiffs' claims if presented, and the defendant's repudiation of the contract, the plaintiffs, in order to mitigate their damages, were forced to reseed the acreage on which the winter wheat crop had been destroyed even though it was neither customary, practical, or in accord with good farming practices to so reseed. That the cost of reseeding the acres was approximately $6.50 per acre and plantiffs reseeded approximately 40,000 acres.

XII.

That because of peculiar, unpredictable weather circumstances, the spring wheat seeded on the above mentioned acres yielded more than the insured minimum, so plaintiffs' damage caused [76] by the breach of the contract was limited to the additional expense of seeding the spring wheat, which expense would not have been incurred by plaintiffs if defendant had not denied coverage for the winter kill loss.

Wherefore, Plaintiffs pray for damage in an amount equal to the sum determined by multiplying the number of insured acres reseeded by $6.50 per acre plus interest; for judgment reinstating the insurance contract; for their costs and disbursements herein expended; and for such other and

further relief as to the Court may seem just and equitable.

KIMBALL & CLARK,
/s/ By C. M. CLARK,
Attorneys for Plaintiffs. [77]

[Endorsed]: Filed February 20, 1958.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT, FOR VACATION THEREOF, AND FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

The Court granted defendant's motion for summary judgment in the above entitled cause, and order of summary judgment was entered on the 11th day of February, 1958. Plaintiffs have moved the court for reconsideration of said summary judgment, for vacation thereof, and for leave to file a second amended complaint. The court has considered said motion and the records and files herein, and is fully advised in the premises.

It Is Now, Therefore, Ordered that plaintiffs' motion for reconsideration of the entry of summary judgment in the above entitled cause, for vacation of said judgment, and for leave to file a second amended complaint, is hereby denied.

Dated this 21st day of February, 1958.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed February 21, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above named plaintiffs hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of Summary Judgment entered in this action on February 11, 1958.

KIMBALL & CLARK,
/s/ By NED W. KIMBALL,
Attorneys for Appellants. [93]

[Endorsed]: Filed March 13, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington do hereby certify that the documents annexed hereto are the original documents filed in the above-entitled cause, to-wit: Date Filed: 9/4/56 —Title of Document: Complaint. 9/4/56—Summons. 9/4/56—Affidavit of Service by Mailing. 9/4/56—Motion and Affidavit for Removal. 9/4/56 —Certificate of Service by Mail. 9/4/56—Order for Removal. 9/4/56—Certificate. 9/25/56—Consent to Removal. 10/5/56—Answer (Certificate of

Service by Mail Attached). 11/21/56—Amended Answer; Counter-Claim (with attachments). 1/2/57—Reply to Amended Answer and Counter-Claim. 3/8/57—Consent of Plaintiff for Defendant to File Second Amended Answer and Counter-Claim. 3/20/57—Second Amended Answer and Counter-Claim (with Certificate of Service by Mail Attached). 3/28/57—Reply to Second Amended Answer and Counter-Claim. 9/23/57—Amended Complaint. 12/4/57—Motion to Dismiss or in the Alternative for Summary Judgment (Exhibits A to D and Certificate of Service by Mail attached). 12/18/57—Affidavit—C. M. Clark (Exhibits "E", "F", "G", "H", and "I" attached). 12/18/57—Affidavit—Lloyd McLean. 1/30/58—Opinion of the Court. 2/11/58—Order of Summary Judgment. 2/20/58—Motion for Leave to File Second Amended Complaint. 2/20/58—Exceptions to the Order of Summary Judgment and Opinion of the Court. 2/21/58—Order Denying Motion for Reconsideration of Summary Judgment, for Vacation Thereof, and for Leave to File Second Amended Complaint. 3/12/58—Appeal Bond (Civil). 3/13/58—Notice of Appeal. 3/26/58—Praecipe for Transcript on Appeal. 4/4/58—Appellees' Designation of Record on Appeal (Certificate of Service by Mail Attached).

and that the same constitute the record for hearing of the appeal from the Order of Summary Judgment of the United States District Court for the Eastern District of Washington, as called for

in the Appellants' Praecipe for Transcript on Appeal and Appellees' Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 18th day of April, 1958.

/s/ STANLEY D. TAYLOR,
Clerk.

[Endorsed]: No. 16002. United States Court of Appeals for the Ninth Circuit. Harold Roberts, et al., Appellants, vs. Federal Crop Insurance Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: April 21, 1958.

Docketed: April 30, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16002

HAROLD ROBERTS, RALPH McLEAN, et al.,
Plaintiffs-Appellants,

vs.

THE FEDERAL CROP INSURANCE CORPORATION, an agency of the United States,
Defendant-Respondent.

APPELLANTS' STATEMENT OF POINTS

Come now the appellants by their attorneys, Kimball & Clark, and list the following points upon which the appellants intend to rely:

(1) That the contract of insurance issued by the Federal Crop Insurance Corporation expressly covers the loss by winter-kill of winter wheat.

(2) That the insured's, appellants herein, suffered total loss of winter wheat by winter-kill.

(3) That any inconsistencies or ambiguities in the insurance contract must be construed in favor of the insureds, and that under the contract the loss is specifically covered.

(4) Paragraph 8 of the insurance contract provides that the crop insurance policy as issued by the Federal Crop Insurance Corporation covers the crop from the time it is seeded, and Paragraph

16 of the insurance contract provides that the loss shall be deemed to have occurred when the entire crop is destroyed.

(5) That the Federal Crop Insurance Corporation, by its authorized agents, waived the requirement of formal proof of loss and that the Federal Crop Insurance Corporation is estopped to rely on the requirement of filing formal proofs by their rejection of the plaintiffs' claims by authorized agents of the Federal Crop Insurance Corporation within the time provided for filing proofs of loss.

(6) That the allegations in the complaint fully state a cause of action within the express provisions of the insurance contract and as shown by the exhibits in the record.

(7) That the summary judgment as granted by the Court was in error and that this decision should be reversed and the matter returned to the district court for trial.

Dated the 19th day of May, 1958.

KIMBALL & CLARK,
/s/ By NED W. KIMBALL,
Attorneys for Plaintiffs-Appellants.

[Endorsed]: Filed May 21, 1958. Paul P. O'Brien, Clerk.

No. 16002

United States
Court of Appeals
For the Ninth Circuit

HAROLD ROBERTS, et al., Appellants,

vs.

FEDERAL CROP INSURANCE CORPORATION, Appellee.

Brief of Appellants

Appeal from the United States District Court for the
Eastern District of Washington
Northern Division

KIMBALL & CLARK
Attorneys for Appellants
Waterville, Washington

FILED
AUG 18 1958
PAUL P. O'BRIEN, CLERK

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statement of the Case	1
Questions Involved	4
Argument	5

STATUTES

7 USCA 1506 (d)

CASES

Federal Crop Insurance vs. Merrill
336 U. S. 380, 68 S. Ct. 1, 92 L. Ed. 10 12

Felder vs. Federal Crop Insurance
146 Federal (2d) 638 - 640 11

Lawrence vs. Northwest Casualty
(1957) 50 Wn. (2d) 282, 311, Pac. (2d) 670 8

Mock vs. United States (loth Cir.)
183 Fed. (2d) 174 11

Pagni vs. New York Life Insurance Co.
173 Wn. 322, 23 Pac. (2d) 6 6

Reynolds vs. Travelers Insurance
176 Wn. 36, 29 Pac. (2d) 310 12

United States vs. Morrell
204 Fed. (2d) 490, 36 A.L.R. (2d) 1374 14

29 *American Jur. Insurance*
pages 180 - 187, para. 166, 167 8

29 *American Jur. Insurance*
page 859, para. 1143 10

OPINION BELOW

The opinion of the District Court appears in the record, beginning on page 55 to page 69 inclusive.

JURISDICTION

The jurisdiction of the District Court and of this Court is invoked under 7 U.S.C.A. 1506 (d). This cause was removed from the State Courts of Washington to the Federal District Court by stipulation of counsel.

STATEMENT OF THE CASE

This is an appeal from a summary judgment for defendant granted by the District Court for the Eastern District of Washington, Northern Division.

The plaintiffs are all farmers residing in Douglas County, State of Washington (R. 3, 7, 18, 22, 55) who seeded winter wheat in the fall of 1955 (R. 4, 7, 18, 22, 55), and each plaintiff had in force a Crop Insurance Policy (Exhibit A; R. 4, 7, 18, 22, 27, 55)) insuring the policy-holder against loss of his winter wheat crop by winter-kill (Ex. A, Page 1; R. 12).

The policy provisions involved are the Insuring Clause (R. 12), Paragraph 1 R. 12), Paragraphs 4, 8, 14, 17 (R. 13).

In the Spring of 1956 (R. 56), on or subsequent to the 25th day of March, 1956 (R. 72), when the snow had melted it was apparent that the wheat was a "total

loss'' from winter kill (R. 56).

To determine if the insurer (Appellee) would pay for said loss, the farmers in the area called a public meeting on April 9, 1956, at the St. Andrews Grange, St. Andrews, Washington. Mr. Creighton F. Lawson, Washington State Director of defendant corporation attended this meeting (R. 5, 24, 56). Mr. Lawson advised those present that the position of the Federal Crop Insurance Corporation was that if claims were filed at that time for the loss by winterkill, the claims would be rejected.

Mr. Lawson, at the meeting of April 9, 1956, signed the following statement (R. 45):

> ''The undersigned, State Director of Federal Crop Insurance Corporation, does hereby state that if the policy holders of Federal Crop Insurance in Douglas County make a claim under the policies to be paid for the 1956 crops at this time said claims will be rejected in his opinion.
>
> Dated this 9th day of April, 1956.''

Mr. Lawson further stated that it was the Company's position that the policy coverage would not attach to the crop that had been lost by winterkill unless a spring wheat crop was replanted on the same land (R. 30). This position is based on paragraph 4, Exhibit A (R. 13).

After being informed of the Company's position that the loss was not covered by the policy as interpreted by the Federal Crop Insurance Corporation, it was obvious that it would be useless to file claims and appellants were advised by their counsel to reseed for the sole purpose of mitigating appellants' damage (R. 47). Appellants' did reseed to spring wheat and because of peculiar, unpredictable weather circumstances the spring wheat seeded on the acres involved yielded more than the insured minimum so that appellants' only damage, resulting from appellee's failure to pay for the lost crop, was an amount of money equal to the cost of reseeding. (It has never been and is not now the position of appellants that any policy provision covers specifically the cost of reseeding as such. The cost of reseeding is simply the extent of the monetary damage resulting from the breach of the insurance contract by the Company).

That Lawson's statement of the appellee's position was accurate cannot now be disputed. Appellee's Answer (R. 7) and Second Amended Answer (R. 18) both admit or restate it and appellee's manager, in his letter of May 21, 1956, which was written before the expiration of the claims period, adopted, ratified, and approved Lawson's statement of the appellee's position and then restated it for the appellee (R. 52).

On defendant's motion for summary judgment the

trial court, contrary to the terms of the policy, found that filing formal proof of loss was a prerequisite to liability (R. 65).

The District Court further found that the rule applicable to private insurance companies in relation to waiver and / or estoppel resulting from a denial of liability during the period for filing proofs of loss does not apply to the Government (R. 66, 67).

QUESTIONS

1. Is a government corporation which is engaged in the private enterprise field of insurance bound by some of the same rules of business conduct as a private carrier, or is the government entitled to some peculiar legal position because it is the government?

Decision in this case will be determined by the Court's determination of whether the Federal Crop Insurance Corporation is bound by the following contract rules.

The specific rules of contract inherent in the case at bar are:

A. The rule that an ambiguity in an insurance contract must be interpreted in favor of the insured and against the insurer.

B. The rule that denial of liability during the period for filing proofs of loss waives the insurer's

right, and estops the insurer from relying upon this defense in an action on the contract.

ARGUMENT

It is admitted that each of the plaintiffs had a contract of insurance in force with appellee insuring plaintiffs' wheat against loss by winterkill (R. 7, 18, 27).

The applicable policy section (Ex. A, R. 12) is the insuring clause and the first sentence of Paragraph one which states:

> "In consideration of the representations and provisions in the application upon which this policy is issued, which application is made a part of the contract, and subject to the terms and conditions set forth or referred to herein, the Federal Crop Insurance Corporation (hereinafter designated as the Corporation) does hereby insure ———————— (Hereinafter designated as the insured) against unavoidable loss on his wheat crop due to drought, flood, hail, wind, frost, winter-kill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes as may be determined by the Board of Directors of the Corporation. (For irrigated acreage, also see section 31.)
>
> In witness whereof, the Federal Crop Insurance Corporation has caused this policy to be issued——.
>
> ————————.
>
> Federal Crop Insurance Corporation
>
> By
> State Crop Insurance Director.

TERMS AND CONDITIONS

1. Kinds of wheat insured. The wheat to be insured shall be winter and spring wheat seeded for harvest as grain."

The insurance attached when the crop was seeded. Exhibit A, Paragraph 8 (R. 13), among other things, states:

"Insurance period. Insurance with respect to any insured acreage shall attach at the time the wheat is seeded."

It is admitted that the crop involved in this litigation was planted in the fall of 1955 (R. 4, Para. III, R. 7, Para. II). It therefore follows, under the terms of the contract, that the crop was insured in the fall of 1955 and was insured at the time it was destroyed during the winter of 1955 and 1956.

Paragraph 16, Exhibit A (R. 13) provides:

"16. Time of Loss. Any loss shall be deemed to have occurred at the end of the insurance period, unless the entire wheat crop on the insurance unit was destroyed earlier, in which event the loss shall be deemed to have occurred on the date of such damage as determined by the Corporation."

It is admitted by the corporation in its amended answer, Paragraph II, (R. 7), and its second amended answer, Paragraph II (R. 18) that this insured crop was a total loss in the spring of 1956 when the snow melted off the land.

By the clear terms of the policy as stated above, the appellants had suffered a loss insured against by appellee's insurance during the period of coverage, and are therefore clearly entitled to be paid.

Appellees take the position that in order to recover appellants must plant a second crop (spring wheat) and have it fail before recovery may be had. In other words, appellees take the position that they are not insuring against winter-kill in spite of its own policy terms. Counsel is assuming that the Court will take judicial notice that winter-kill is not a hazard of a spring wheat crop. Conversely appellees, after the loss, say that they did not insure the crop planted in the fall of 1955 but will only insure a subsequent spring wheat crop planted in the same ground.

Appellee's position, as reported by Mr. Lawson (R. 30, 48) and Mr. Fretts, Manager of Federal Crop Insurance Corporation, Washington, D. C. (R. 52) is that Paragraph 4 of Exhibit A is controlling. Paragraph 4 in effect says that if the winter wheat is lost, the coverage on that wheat will not attach until the crop has been replaced by spring wheat. It is nonsensical. This is a denial of coverage on the winter wheat for the risk of winter-kill and is inconsistent with the insuring clause.

Paragraph 4, Exhibit A (R. 13) which provides that

the insurance does not attach on winter-killed wheat acres unless the crop is reseeded is also inconsistent with language of Paragraph 8 which says that the insurance attaches when the crop is seeded, and Paragraph 12, Exhibit A. (R. 13) which states the premium is deemed earned when the crop is seeded.

In order to afford the appellants the coverage they bought, i. e. coverage of winter wheat from loss by winter-kill, these ambiguities must be resolved in favor of the assureds. It is fundamental insurance and contract law that all ambiguities in insurance policies are construed against the company and in favor of the assureds. 29 Am. Jur. Insurance, Section 166, 167, page 180-187.

In *Lawrence vs. Northwest Casualty Co.* (1957) 50 Wn. (2d) 282, 311 Pac. (2d) 670, in a typical statement of the rule, the Washington Supreme Court said:

> "While it is true that if an insurance contract is fairly susceptible of two different interpretations, the one which is most favorable to the insured must be adopted, the rule has no application where the provisions of a policy are neither ambiguous nor difficult of comprehension. *Jeffries v. General Cas. Co. of America,* 46 Wn. (2d) 543, 283 P. (2d) 128. When construing the terms of an insurance policy, the court seeks to determine the intent of the parties, and the general rules governing the construction of contracts must be applied; and the court will give the language its popular and ordinary meaning, unless it is apparent from a reading of the whole instrument that a different or special mean-

ing was intended or is necessary to avoid an absurb or unreasonable result. Christensen v. Sterling Ins. Co., 46 Wn. (2d) 713, 284 P. (2d) 287."

To give the appellee the requested interpretation of its contract would violate not only the spirit of the insurance and contract law that has been developed over the many years, but violates the insuring clause of this policy which specifically insures against winter-kill. Appellee's interpretation forces an absurb result. The ambiguity of the contract becomes more apparent when you consider the only obvious intent of the appellants when buying the insurance was to purchase coverage against all risks, including winter-kill.

If this court holds with appellants on the above matters, then on April 9, 1956, appellants were entitled to be paid for their lost crop. When the Company refused to pay, it repudiated its insurance contract with appellants. The trial court stated that Mr. Lawson could not repudiate the contract and that there had been no repudiation. Appellants' position is and has been (R. 6 and 26) that the Company repudiated by refusing to pay, claiming Paragraph 4 was controlling, and that Lawson merely conveyed to plaintiffs the Company's position. The Company had the capacity to refuse payment and such refusal was a repudiation of the contract. The Company, having repudiated, cannot now defeat plaintiffs' claims on the basis of plaintiffs' failure to file proofs of loss when such failure

was brought about by the obvious futuility of filing proofs after the repudiation.

The rule is clearly stated in 29 Am. Jur., pages 859, para. 1143, as follows:

> "A denial of liability by an insurer, made during the period prescribed by the policy for the presentation of proofs of loss, and on grounds not relating to the proofs, will ordinarily be considered a waiver of the provision of the policy requiring the proofs to be presented, or a waiver of the insufficiency of the proofs or of defects therein. The denial of liability is equivalent to a declaration that the insurer will not pay although proofs are furnished in accordance with the policy, and the law will not require the doing of a vain or useless thing."

In Pagni vs. New York Life Insurance Co., 173 Wn. 322, 23 P. (2d) 6, the rule was set forth by the Washington Supreme Court in the following language at page 333:

> "The position of the respondent is not tenable. If an insurance company denies all liability and the insured, relying upon such denial, omits to file a proof of loss . . . although such proof is required by the terms of the policy. . such company will be deemed to have waived such proof, and will be estopped to offer in defense evidence of the fact that no proof of loss was filed. *Russell vs. Granite State Fire Ins. Co.,* 12 Me. 248, 116 Atl. 554."

The District Court, in its opinion, relied upon three cases in support of the opinion. All three of these cases upon careful analysis are readily distringuishable, and do not, in fact, support appellee's position.

In Felder vs. Federal Crop Insurance Corporation, 146 Fed. (2d) 638, 640 no representations of officials were made until after the time for filing claims had elasped whereas, in the case now before this Court, representations were made and relied upon during the time for filing claims. The Court in the Felder case recognized this when it used the following language: "We might point out that this case involves no element of technical estoppel." It would seem to follow that the Court in the Felder case would recognize the doctrine of estoppel against the government under a proper set of facts. Appellant is of the opinion that the case at bar is squarely within the proper application of the rule of estoppel.

The case of *Mock vs. United States* (10th Cir.), 183 Fed. (2d) 174, is a waiver case. Mr. Mock was advised by a county official not to file a proof of loss. The Court said that there was no showing that the county official was authorized to waive the requirement of proof of loss. As in the case under consideration there was no denial of liability during the period for filing claims, and the court based its decision partly, at least, upon proof that there had been no damage. If appellants claimed that Mr. Lawson personally waived the proof of loss requirement by advising that proofs need not be filed, the Mock case would be in point. That is not appellants' position. In the case

at bar the waiver and / or estoppel arose from an act of the company itself, i. e. taking a position that there was no liability under the terms of the contract. If any authority needs be shown for Lawson in the instant case, it is the authority to speak for the corporation, that is to relate, accurately, the corporate position. This authority was claimed by him (Exhibit C, R. 43), admitted by the company in its pleading (R. 7 and 18), and ratified by the company (Exhibit I, R. 52).

Keeping in mind that waiver is a voluntary relinquishment of a known right and that estoppel pre-supposes some conduct or dealing by which the other is induced to act or forbear to act (*See Reynolds vs. Travelers Insurance,* 176 Wn. 36, 29 (2d) 310) it is apparent that the Mock case is not apt.

In Federal Crop Insurance vs. Merrill, 336 N. S. 380, 68 S. Ct. 1, 92 L. Ed. 10, a policy was written insuring the plaintiff's spring wheat crop, which crop was seeded on land that had already been seeded to winter wheat in the same growing season and the winter wheat crop had failed.

The Merrill case is plainly distinguishable on several sold grounds:

First: The Merrill case involved a situation in which the contract attempted to be entered into was

prohibited by statute. The statute did not permit the Federal Crop Insurance Corporation to insure spring wheat crops on land which during the same season had been seeded to winter wheat. In the case now before this court there arises no question concerning the validity of the contract between plaintiffs and defendant. The Merrill case was an attempt to enforce a contract specifically prohibited by law.

Second: In the Merrill case the advice given by the County Committee that the crop was insurable was incorrect. In the present case the advice given by Lawson, both orally and in writing was, in fact, correct advice.

Third: There is nothing in the valid contract between plaintiffs and defendant in the present case which is not authorized by the regulations, to-wit: insurance against the loss of winter wheat by Winterkill.

Fourth: The Merrill case does not turn on lack of authority or estoppel. It is based squarely, and we belive only, on the point that Congress did not authorize the kind of contract sought to be enforced. In spite of the illegality of the contract, the decision was a 5 to 4 ruling.

For these reasons, it would appear that the Merrill case espouses no applicable law which will support defendant's position.

We submit to this court that from the facts in this record there is no basis in law, equity or justice why the government should be entitled to enter the crop insurance field, accepting the profits there-from and not be bound by the principles of insurance law which have been developed over a long period of time by the courts.

In construing the government's obligations under National Service Life Insurance, the Supreme Court denied certiorari in the case of *U. S. vs. Morrell,* 204 Fed. (2d) 490, 36 A.L.R. (2d) 1374, which case held that there was no reason why the government shouldn't be bound by some of the laws relating to private companies. The Court said (36 A. L. R. (2d), page 1380);

> "We do not think that the broad contention, that the general rules of law of insurance have no application to the liability of the government under its National Service Life Insurance policies, can be sustained. In the application of these rules the broad sweep of government activities and the relationship between the government and its countless employees are of course taken into account; and so it has been held that liability of the United States under these policies is not created by estoppel or waiver, based upon the acts or omissions of its agents, especially as they have no power to alter the insurance contract or modify the provisions of the statute. See James v. United States, 4 Cir. 185 F2d 115; Crawford v. United States, 2 Cir, 40 F2d 99. But it cannot be said that when the government enters the insurance business it is free because of its sovereign character

from all restraint, and that no heed be given to the principles of law that have been worked out by the courts in the field of insurance law."

We respectfully submit that the granting of the summary judgment is in error and that the holding of the District Court should be reversed.

KIMBALL & CLARK,
Attorneys for Appellants

No. 16002

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD ROBERTS, et al., *Appellants,*

vs.

FEDERAL CROP INSURANCE CORPORATION, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

BRIEF OF APPELLEE

DALE M. GREEN,
United States Attorney,

ROBERT L. FRASER,
Assistant United States Attorney,
Attorneys for Appellee.

SHAW & BORDEN CO. 322549

FILED

SEP 15 1958

INDEX

Page

Jurisdiction ---------- 1

Additional Statement of Facts ---------- 2

Additional Statement of the Case ---------- 2

Summary of Argument ---------- 5

Argument ---------- 6

I. Should the Appellants' Allegation of Ambiguity in the Provisions of the Contract be Considered in the Determination of this Cause---- 6

II. Does Estoppel Apply Against the Corporation, a Government Agency, Where Its Agents Committed An Act Which Contravened the Applicable Statutes and Regulations -------- 7

III. Appellants Are Prevented From Invoking the Doctrine of Estoppel Against the Corporation by Virtue of Their Course of Conduct ---- 17

Conclusion ---------- 20

CITATIONS

Cases: Page

Brindly v. Firemen's Insurance Co. of Newark, N. J., 113 A. 2nd 53, 35 N. J. Super. 1 12

California State Board of Equalization v. Coast Radio Products, 228 F. 2nd, 520, 525 (9 C.A. (1955) 17

Federal Crop Insurance Corporation vs. Merrill, 332 U.S., 380 8, 13, 15

Felder vs. Federal Crop Insurance Corporation, 146 F. 2nd 638 13, 14

Froslee v. Sonju, 209 Minn. 522, 297 N.W. 1, 3, 4 18

Georgia Home Insurance Co. v. Jones, 135 S.W. 2nd 947, 951 11

Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 390 16

Mescall v. W. T. Grant Co., 7 Cir., 133 F. 2nd 209, 211 18

Milton Ice Co., Inc. v. Travelers Indemnity Co., 71 N.E. 2nd 232 12

Mock vs. United States, 183 F. 2nd 174 13, 14

Rock Island, Arkansas and Louisiana Railroad Co., vs. United States, 254 U.S. 141, 143 15

Standard Acc. Ins. Co. v. Cherry, 48 S.W. 2nd 755 12

CITATIONS (Continued)

Cases: Page

Uhlmann Grain Co. v. Fidelity & Deposit Co. of Maryland, 7 Cir., 116 F. 2nd 105, 109 18

United States vs. San Francisco, 310 U.S. 16, 32 13, 17

United States vs. Shaw, 137 F. Supp. 24 (N. Dak. 1956) 15, 18

STATUTES

Wedgwood v. Eastern Commercial Travelers Acc. Ass'n., 32 N.E. 2nd 687 12

44 U.S.C.A., Section 307 8

7 U.S.C.A., Section 1503 8

7 U.S.C.A., Section 1506(d) 1

7 U.S.C.A., Section 1508(c) 2

7 U.S.C.A., Section 1516(b) 12

Federal Register of September 21, 1951 (Vol. 16, No. 184, Page 9628, et seq) 8, 12

TEXTS

Ballentine's Law Dictionary (1930) 11

45 C.J.S., sec. 981, sec. 982(1)(a) 11

Couch on Insurance, Vol. 7, Sec. 1528 11

No. 16002

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD ROBERTS, et al., *Appellants,*

vs.

FEDERAL CROP INSURANCE CORPORATION, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

BRIEF OF APPELLEE

JURISDICTION

The appellants in their brief state that jurisdiction of the District Court and this Court is invoked under Title 7, U.S.C.A. 1506(d). Although the appellee does not attack nor question the jurisdiction of this Court,

it should be noted that the appellants' amended complaint, (R. 22), which the appellee moved against by Motion for Summary Judgment, sets out the statute upon which the appellants are claiming jurisdiction as being Title 7, U.S.C.A. 1508(c), the applicable portion of which is set out herein:

> ". . . In the event that any claim for indemnity under the provisions of this chapter is denied by the Corporation, an action on such claim may be brought against the Corporation in the United States district court, or in any court of record of the State having general jurisdiction, sitting in the district or county in which the insured farm is located, and jurisdiction is conferred upon such district courts to determine such controversies without regard to the amount in controversy: Provided, That no suit on such claim shall be allowed under this section unless the same shall have been brought within one year after the date when notice of denial of the claim is mailed to and received by the claimant."

ADDITIONAL STATEMENT OF FACTS

In order that the question involved may be better pointed out, an additional statement of the case will be summarized.

ADDITIONAL STATEMENT OF THE CASE

The plaintiffs are all farmers residing in Douglas County in the State of Washington (R. 3, 7, 18, 22, 55). Each of the plaintiffs had in force a Federal

Crop Insurance Corporation wheat crop insurance policy (Ex. A; R. 4, 7, 18, 22, 27, 55) insuring the policy holder against loss of his winter wheat crop by winter-kill (Ex. A; R. 12). Each of the plaintiffs was furnished (R. 28) a copy of the wheat crop insurance policy (Ex. A; R. 12, 13, 14, 15, 32 through 40).

On April 2, 1956, Ralph McLean, one of the individual plaintiffs, gave notice of probable loss to the Federal Crop Insurance Corporation (hereinafter called the Corporation) of wheat killed by winter-kill (R. 28). The record fails to reveal what reply, if any, Mr. Creighton Lawson, the Washington State Director for the Corporation, gave to Mr. McLean at that time, but in any event, Mr. Lawson was requested to be present at a meeting of Douglas County farmers in St. Andrews, Douglas County, Washington, on April 9, 1956 (R. 29). Mr. Lawson did not know any of the individuals present at the meeting other than Curt Clark, one of the attorneys for the appellants and some of the adjusters (R. 30).

The appellee's version of what Mr. Lawson said at the meeting (R. 29 and 30) and the appellants' version of what was said differ (R. 46, 47 and 54); however, Judge Driver, in granting summary judgment for the Government, took the plaintiffs' version of the facts as the true and correct one wherever there was a difference. (R. 55). The appellee, for purposes

of this appeal, accepts the appellants' version as set out in the appellants' brief, however, rejecting their legal conclusions. The appellants' version, in substance, is that Mr. Lawson was credited with saying that he was authorized to speak for the Corporation, and that should any claims be filed for winter-killed wheat they would not be paid by virtue of the provisions set out in Paragraph 4 of the insurance policy (R. 13), in that it was practical to reseed the wheat, further claiming that Creighton Lawson's conduct was ratified by Mr. C. A. Fretts, then acting manager of the Corporation.

None of the appellants has ever filed the Proof of Loss (R. 31, 59) as required by Paragraph 17 of the policy of insurance (R. 13).

On the basis of what Mr. Lawson said at the meeting of April 9, 1956, and the letter from Mr. C. A. Fretts addressed to appellants' attorneys (R. 51, 2, 3, 4), the appellants brought their action, basing their claim on the alleged fact that the Corporation had repudiated the contract of insurance (R. 24), claiming damages.

SUMMARY OF ARGUMENT

The Corporation moved for summary judgment in the District Court, alleging that it was entitled to a judgment as a matter of law on the grounds that there were no issues of any material fact. This motion was supported with an affidavit (R. 26 through 31), reflecting that none of the plaintiffs had complied with Paragraph 17 of the policy inasmuch as they had failed to furnish proofs of loss. The appellants did not file any counter affidavits reflecting that the proofs of loss were filed but defended the motion on the grounds that the Corporation, through Mr. Creighton Lawson and Mr. C. A. Fretts, denied liability and, therefore, the doctrine of estoppel should have necessarily been invoked against the Corporation on the grounds that the filing of the proofs of loss would have been a useless act.

It is the appellee's position that there are two salient reasons as to why the doctrine of estoppel should not be invoked against the Corporation and that the judgment of the District Court should be affirmed: (1) The alleged acts of the defendant Corporation's agents, Creighton Lawson and C. A. Fretts, which acts the plaintiffs allegedly relied on in their wilful failure to file their proofs of loss, were in direct contravention of all the applicable statutes and regulations. Therefore, the principle of law that

the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction, applies to this case.

(2) One of the requirements that a party must meet in order to invoke the doctrine of estoppel against another is that the person attempting to invoke estoppel shall be ignorant of the true facts. It is the appellee's position that the very language used in the policy of insurance, published in the Federal Register, sets out the requirements to be met and that the appellants should have been aware of the facts, or were negligent in failing to know them, as there existed ample opportunity and means of ascertaining the facts.

ARGUMENT

I

Should the Appellants' Allegation of Ambiguity in the Provisions of the Contract be Considered in the Determination of this Cause.

The appellants in their brief raised the question that ambiguity in an insurance contract must be interpreted in favor of the insured and against the insurer, citing cases to support this contention. The appellee does not dispute with nor object to this general statement of law but does contend that it should not be considered in the determination of this

appeal. Had the District Court not granted the summary judgment for the appellee then the question whether the contract was ambiguous would properly be before the Court. Judge Driver, in granting summary judgment for the appellee, did not grant the judgment on any question of ambiguity (R. 55 through 69) but based his opinion squarely on the proposition that the appellants failed to comply with the terms of the policy in failing to give proof of loss, and, further, that any acts of the Corporation's agents, allegedly relied on by the plaintiffs, were in contravention of the statutes and regulations, thereby prohibiting the appellants from invoking the doctrine of estoppel and waiver.

II

Does Estoppel Apply Against the Corporation, a Government Agency, Where Its Agents Committed an Act Which Contravened the Applicable Statutes and Regulations.

Accepting the appellants' version as to the course of conduct of the Corporation's agents, the question boils down to that as set out above.

The appellants posed the question succinctly in another manner on Page 4 of their brief by in effect asking the question whether a Government corporation which is engaged in the field of crop insurance is bound by the same set of rules which govern a

private company. *Federal Crop Insurance Corporation v. Merrill,* 332 U.S., 380, discussed later, clearly answers the question for the appellants.

In bringing this action the appellants relied on the general rules of insurance laws, that, if the insurer, during the period in which proofs of loss are to be made, denies liability, the insurer is deemed to be estopped from invoking or to have waived the right to demand proofs of loss. The appellee does not quarrel with this general principle of law in its application against private insurance carriers, however, it is the appellee's position that under the facts of this controversy and the principles of law the doctrine of estoppel or waiver does not apply to the Corporation, a government agency.

At the outset, it must be said that the Federal Crop Insurance Corporation is a Government agency within the United States Department of Agriculture (R. 57), by virtue of Title 7, Section 1503, U.S.C.A. *See Federal Crop Insurance Corporation v. Merrill, supra.* The form of the wheat corporation insurance policy which is the basis for this suit (Ex. A; R. 12, 13, 14, 15, 32 through 40) is prescribed in a federal regulation which has the force and effect of a statute, and constitutes legal notice of their contents, 44 U.S.C.A., 307. It was published in the Federal Register of September 21, 1951 (Vol. 16, No. 184, Page 9628, et seq) (R. 57).

There are three salient provisions of this contract of insurance which of necessity should be referred to. They are the same provisions that are contained in the policies that were furnished to all appellants (R. 28).

"14. *Notice of Loss or Damage.*

(a) If any damage occurs to the insured crop during the growing season and a loss under the contract is probable, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office promptly after such damage. (b) If a loss under the contract is sustained, notice in writing (unless otherwise provided by the Corporation) shall be given the Corporation at the county office within 15 days after threshing is completed or by October 31, whichever is earlier. (c) The Corporation reserves the right to reject any claim for indemnity if either of the notices required by this section is not given." (R. 13).

"17. *Proof of Loss.*

If a loss is claimed, the insured shall submit to the Corporation, on a Corporation form entitled "Statement in Proof of Loss", such information regarding the manner and extent of the loss as may be required by the Corporation. The statement in Proof of Loss shall be submitted not later than 60 days after the time of loss, unless the time for submitting the claim is extended in writing by the Corporation. It shall be a condition precedent to any liability under the contract that the insured establish the production of wheat on the insurance unit, the

amount of any loss for which claim is made, and that such loss has been directly caused by one or more of the hazards insured against by the contract during the insurance period for the crop year for which the loss is claimed, and that the insured further establish that the loss has not arisen from or been caused by either directly or indirectly, any of the causes of loss not insured against by the contract. If a loss is claimed, any wheat acreage which is not to be harvested shall be left intact until the Corporation makes an inspection." (R. 13).

The Proof of Loss form referred to in Paragraph 17 of the Insurance Policy is set out verbatim on R. 41.

"28. *Modification of Contract.*

No notice to any representative of the Corporation or the knowledge possessed by any such representative or by any other person shall be held to effect a waiver of or change in any part of the contract, or to estop the Corporation from asserting any right or power under such contract, nor shall the terms of such contract be waived or changed except as authorized in writing by a duly authorized officer or representative of the Corporation; nor shall any provision or condition of this contract or any forfeiture be held to be waived by any delay or omission by the Corporation in exercising its rights and powers thereunder or by any requirement, act, or proceeding on the part of the Corporation or of its representatives relating to appraisal or to any examination herein provided for." (R. 14).

This form of crop insurance policy explicity sets forth those standards that a claimant must adhere to in presenting a claim of loss. The policy requires two affirmative acts on the part of any person claiming compensation for losses, these acts being a condition precedent for any liability on the part of the Corporation. The claimant is required by the provisions of Paragraph 14 supra of the policy (R. 13) to give written notice of loss to the Corporation, and by the provisions of Paragraph 17 supra of the policy (R. 13) to submit Proof of Loss to the Corporation on a Corporation form.

These two affirmative acts required of a claimant are separate and distinct and serve different purposes: The Notice of Loss informs the company that the contingency insured against has occurred, while Proof of Loss supplies evidence of the particulars of the occurrence and information necessary to enable the insurer to determine its liability in the amount thereof. [R. 65, See Ballentine's Law Dictionary (1930); 45 C.J.S., sec. 981, sec. 982(1)a]. The giving of Notice of Loss does not dispense with the requirement that a Proof of Loss be submitted. (R. 65, *see Couch on Insurance,* Vol. 7, Sec. 1528; *Georgia Home Insurance Company v. Jones,* 135 S.W. 2d 947, 951.)

Case law relating to private insurance carriers reflects that in the absence of waiver or estoppel, there must be a substantial compliance with the require-

ment that written Proof of Loss be furnished to the Company. (R. 65, see *Wedgwood v. Eastern Commercial Travelers Acc. Ass'n,* 32 N.E. 2d 687; *Standard Acc. Ins. Co. v. Cherry,* 48 S.W. 2d 755; *Milton Ice Co. Inc. v. Travelers Indemnity Co.,* 71 N.E. 2d 232; *Brindley v. Firemen's Insurance Co. of Newark, N. J.,* 113 A. 2d 53, 35 N.J. Super. 1.)

As a question of fact, Mr. Lawson, an agent of the Corporation, did not nor does not have authority to either deny or approve a claim (R. 29). The record fails to disclose any affirmative showing by the appellants as to the extent of authority of Mr. Lawson. Going one step beyond this fact, the form of the policy, the extent and the limitations of the insurance coverage, the requirement as to Proof of Loss, and the reservations against waiver and estoppel are governed by regulations published in the Federal Register, supra. (R. 57). These regulations are specifically provided by statute, 7 U.S.C.A. 1516(b), the applicable portion set out herein:

> "The Secretary and the Corporation, respectively, are authorized to issue such regulations as may be necessary to carry out the provisions of this chapter."

In view of this it must be said that as a matter of law Mr. Lawson, the State Director, did not nor does not have the authority to either cancel or repudiate the insurance contract of the Corporation or have

authority to make any arrangement or commitment binding upon the Corporation which is contrary or not permitted by the governing statutes and regulations, and Mr. Fretts would certainly not have authority to ratify the acts of Mr. Lawson under these conditions.

The principle to be decided in this suit has been brought before the Courts on many occasions and the general principle was clearly enunciated in *United States v. San Francisco,* 310 U.S. 16, 32, and cited Cases:

> " '". . . The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." '

The appellants in their brief distinguish three of the cases Judge Driver relied on in granting summary judgment for the Appellee, namely, *Felder v. Federal Crop Insurance Corporation,* 146 F. 2d 638; *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380; *Mock v. United States,* 183 F. 2d 174. The distinctions drawn by the appellants apply only to the particular factual situation and do not change the principles of law. These principles of law apply equally well to the facts in the instant case.

In *Mock v. United States,* 183 F. 2d 174, 10 C.A. (1950) the action also involved the Corporation as a defendant. The plaintiff furnished proper Notice of Loss to the Corporation, however, on specific recommendation from the adjuster, who in turn received his information from the County Administrator, the plaintiff failed intentionally to file Proof of Loss. The plaintiff's failure to file Proof of Loss was in reliance on the adjuster's statement. It is to be noted that in the particular contract of insurance, which also was published in the Code of Federal Regulations, there was a provision very similar to Paragraph 28 of the instant contract. (R. 14, Para. 28). The Court in holding for the Corporation held that it was no waiver, and, ignorance on the part of all concerned did not excuse the plaintiff from filing the Proof of Loss.

In *Felder v. Federal Crop Insurance Corporation,* 146 F. 2d 638, 640, 4th C.A. (1950), the Court also applied the general principle that the United States is not bound by acts of its officers or agents in doing something the law does not sanction. In this particular case the insured grower had not filed a Proof of Loss within the time required by the policy. The Court held that right of recovery was barred and that the requirements had not been waived by an action on the part of the County Committee.

The Court quoted Mr. Justice Holmes' oft-quoted statement which is set forth in *Rock Island, Arkansas and Louisiana Railroad Company v. United States,* 254 U.S. 141, 143:—

> "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. . . . At all events the words are there in the statutes and regulations and the Court is of the opinion that they mark the condition of the claimant's rights."

In *United States v. Shaw,* 137 F. Supp. 24, (N. Dak. 1956), which again was a case involving the Corporation, the Court, in granting judgment for the Government, once again invoked the principle that the insured was bound to know the limitations upon the authority of the agent or agents of a corporation in dealing with them.

Judge Driver, in rendering his Memorandum Opinion (R. 67, 68 and 69), succinctly set forth the issues involved in *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380; S. Ct. 1, 92 L. Ed. 10:

> "wheat growers in Bonneville County, Idaho, applied to the County Committee, acting as agent for the Corporation, for insurance on a crop of growing wheat. Although the Committee was correctly informed that 400 acres consisted of reseeded winter wheat acreage, it erroneously advised the growers that the entire crop was insurable, and upon its recommendation, the Corpor-

ation accepted the application. The crop was destroyed by drought, but the Corporation refused to pay the loss on the ground that the Wheat Crop Insurance Regulations did not authorize insurance on reseeded wheat and, hence, barred recovery as a matter of law. The Supreme Court sustained the contention and reversed the Court of Appeals which had affirmed the District Court. The following language of the opinion, I feel, is applicable in the instant case as well:"

" 'The case no doubt presents phases of hardship. We take for granted that, on the basis of what they were told by the Corporation's local agent, the respondents reasonably believed that their entire crop was covered by petitioner's insurance. And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. See *Keifer & Keifer v. Reconstruction Finance Corp.,* 306 U.S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explic-

> itly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.' ". (pp. 383, 384) (R. 67, 68, 69).

There are a great number of cases setting forth the principle enunciated in *United States v. San Francisco,* supra, and this writer has been unable to find any cases deviating from this principle, however the writer has principally cited cases in this brief which involve the Federal Crop Insurance Corporation, which seemingly reflect the Court's attitude as applying to a Government agency engaged in the field of crop insurance.

III

Appellants Are Prevented From Invoking the Doctrine of Estoppel Against the Corporation by Virtue of Their Course of Conduct.

With relation to defining estoppel, this Court stated in *California State Board of Equalization v. Coast Radio Products,* 228 F. 2d, 520, 525 [9 C.A. (1955)]:—

> "Four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3)

the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury."

In commenting on point (3) the Court in *United States v. Shaw,* supra, on page 28 said:

> "Estoppel cannot be invoked by one who knew the facts or was negligent in not knowing them. Where facts were equally known to both parties, or are facts which the one invoking estoppel ought, in the exercise of reasonable prudence, to know, there can be no estoppel. *Froslee v. Sonju,* 209 Minn. 522, 297 N. W. 1, 3, 4; *Mescall v. W. T. Grant Co.,* 7 Cir., 133 F. 2d 209, 211.
>
> "Where the facts are equally known to both parties, there can be no estoppel; where both parties have equal means of ascertaining the facts, then, too, there can be no estoppel. *Uhlmann Grain Co. v. Fidelity & Deposit Co., of Maryland,* 7 Cir., 116 F. 2d 105, 109."

It should be noted that Paragraph 29 of the contract of insurance involved in the *Shaw* case, supra, at P. 26, is identical to Paragraph 28 of the policy involved in the instant case. (R. 14, Para. 28). The policy provision relating to "modification of contract" (Para. 28) is as follows:

> "*Modification of Contract.* No notice to any representative of the Corporation or the knowledge possessed by any such representative or by any other person shall be held to effect a waiver of or change in any part of the contract, or to estop the Corporation from asserting any right

or power under such contract, *nor shall the terms of such contract be waived or changed except as authorized in writing by a duly authorized officer or representative of the Corporation;* nor shall any provision or condition of this contract or any forfeiture be held to be waived by any delay or omission by the Corporation in exercising its rights and powers thereunder or by any requirement, act, or proceeding on the part of the Corporation or of its representatives relating to appraisal or to any examination herein provided for." (Emphasis supplied) (R. 14).

Paragraph 17 of the policy (R. 13) entitled "Proof of Loss" makes its compliance a condition precedent to the Corporation's liability.

Each of the said appellants was furnished with a copy of the contract (R. 28) containing said provisions. The provisions were there to see and the appellants should be bound by them. Taking these facts and applying them to the law concerning estoppel, it could be concluded that the appellants were aware of the absolute necessity of compliance with the requirements of the policy of insurance, or were negligent in not knowing them, and by virtue of this should themselves be prevented from invoking estoppel as against the Corporation.

CONCLUSION

For the reasons set out herein, it is submitted that the Judgment of the United States District Court should be affirmed.

Respectfully submitted,

DALE M. GREEN,
United States Attorney.

ROBERT L. FRASER,
Assistant United States Attorney.

No. 16002

United States
Court of Appeals
For the Ninth Circuit

HAROLD ROBERTS, et al., Appellants,

vs.

FEDERAL CROP INSURANCE CORPORATION, Appellee.

Reply Brief of Appellants

Appeal from the United States District Court for the Eastern District of Washington
Northern Division

KIMBALL & CLARK
Attorneys for Appellants
Waterville, Washington

FILED
OCT 2 1958
PAUL P. O'BRIEN, CLERK

INDEX

Page

Argument 1

CASES AND TEXTS

U. S. vs. Shaw 137 F. Supp. 24 4

29 Am. Jur. page 859, parg. 1143 6

Appellee's position that there are two reasons why the doctrine of estoppel should not be invoked against the appellee is based on several erroneous assumptions and impressions of the positions of the parties in the case at bar.

Appellant will set forth the assumptions and point out the error in them by way of argument on the basis that if appellee's argument is invalid, appellee's position is not sound.

On pages 5 and 6 of appellee's brief appellee assumes that appellant is relying on the acts of the individual agents and employees regarding the contract as the basis for waiver or estoppel. Appellant's position is and has been that it was the act of the corporation itself which is the basis of the waiver or estoppel and that the agents merely stated to appellants what the corporation had done with relations to the claims. This position of appellant is sound, as is displayed in the Fretts letter appearing on pages 52 and 53 of the Transcript of record, wherein Mr. Fretts stated as follows:

"We believe Mr. Lawson rather adequately set forth *the position of the corporation* under the reseeding requirements of the wheat crop insurance policy in his reply to your letter," and when he stated further, "This, we believe, sufficiently sets forth *the position*

which this corporation is compelled to assume." (Italics ours). They were not the unauthorized acts of Fretts and Lawson as individuals, but were the acts of the corporation, which acts as related by Fretts and Lawson that is the basis for the claimed waiver of the filing of proofs of loss.

Appellees take the position that the statements as made were in direct contravention of law and the defendant could not be bound to do something that the law does not sanction or permit. That the corporation could change the provisions of the proof and notice of loss provisions is clearly evident by the language of the provisions of the contract. Paragraph 14 of the policy is filled with parenthetical expressions as follows: (a) "If any damage occurs to the insured crop during the growing season and a loss under the contract is probable notice in writing (*unless otherwise provided by the Corporation*) shall be given," etc., (b) If a loss under the contract is sustained, notice in writing (*unless otherwise provided by the Corporation*) shall be given," etc., and again in paragraph 28 of the policy wherein it states, "nor shall the terms of such contract be waived or changed (*except as authorized in writing by a duly authorized officer or representative of the Corporation.*" (Italics ours). It is thus clearly shown by the terms of the contract

that the contract could be changed by the corporation within the law so the acts were not unlawful, nor in contravention of any law, in or out of the Federal Register. It is admitted in the answer and amended answer of appellee that Lawson was authorized to speak for the corporation. This appears in the record (R. 7 and R. 18) in the following language: "... and that he was authorized to speak for the corporation; and said statement was in accord with provisions of the act and the wheat insurance contracts."

On page 11 of the brief, appellee has assumed that the filing of notice and proof of loss was a condition precedent to liability of the corporation under the contract. Paragraph 17 of the contract specifies the conditions precedent to liability. Neither the filing of notice of loss nor proof of loss appears on the list as being conditions precedent to liability.

With relation to the cited cases, appellant draws the following distinctions between the facts of those cases and those of the case at bar.

This is not a case against the United States but is a case against a government corporation which has entered into the field of private business. The moneys sought are not funds in the public treasury but are the funds of the corporation. For that reason we feel that the various restrictions in suits against the United

States are not applicable. The following language in U. S. v. Shaw, 137 F. Supp. 24, is apt:

> "An equitable estoppel ordinarly may not be invoked against a government or public agency functioning in its governmental capacity; but where the elements of an estoppel are present it may be asserted against the government when acting in its proprietary capacity. 31 C.J.S., Estoppel, § 138, pp. 403, 404; 19 Am. Jur., Estopped, Section 169, p. 822."

This language should be equally applicable to waiver.

This is not a case where the appellant relied on an adjuster, County Committeemen, or other personnel of the corporation in the county offices to state correctly the position of the corporation. In the cited cases, reliance was placed on the view of the Corporation as stated by County level officers and agents who gave an erroneous statement of the position of the Corporation. In this case the appellants relied on the highest Corporate official in the State of Washington, and on the Washington, D. C., manager of the corporation itself to relate the corporate position and the position was accurately reported to appellants. Since it was apparent to appellants that the filing of the formal proofs of loss would be completely useless, none were filed. Filing of proofs had been waived by the action of the Corporation and the Corporation is estopped.

In conclusion, may we say that the facts of the wheat loss must be considered in order that the relative positions of the parties can be ascertained at the time when the dispute arose. The appellants had a loss covered by insurance. The appellee refused to pay the loss, not on the basis that no proofs were filed, but on the basis that there was no liability under the facts. Appellee's manager and its Washington State director, who, incidentally, claimed to be authorized, which authorization was admitted by appellee in its pleadings (R. 7 and R. 18), in all their correspondence, statements and other communications, never raised any objection to payment on the basis that no proofs of loss were filed. Appellee's counsel in their pleadings made no issue of this fact, but answered on the basis again that there was no liability under the contract and facts of the loss.

Appellants entered into this insurance contract in good faith feeling that an agency of its own government would be anxious to fulfill its contract obligations. We feel that this Court should require that the Federal Crop Insurance Corporation defend its position on the merits, and that it should not be permitted to escape liability on the basis sought when the basis arose from acts of the corporation itself, relied upon by appellants.

Inasmuch as the Federal Crop Insurance Corporation is not a governmental function but a proprietary function of the government, we resubmit to this Court that the facts of his case bring the case squarely within the principles of law as stated in 29 Am. Jur., page 859, para. 1143, as follows:

> "A denial of liability by an insurer, made during the period prescribed by the policy for the presentation of proofs of loss, and on grounds not relating to the proofs, will ordinarily be considered a waiver of the provision of the policy requiring proofs to be presented, or a waiver of the insufficiency of the proofs or of defects therein. The denial of liability is equivalent to a declaration that the insurer will not pay although proofs are furnished in accordance with the policy, and the law will not require the doing of a vain or useless thing."

Respectfully submitted,

KIMBALL & CLARK,

Attorneys for Appellants.